

10 N<sup>o</sup>. 6.

THE  
PRACTICE  
OF THE  
Court of King's Bench  
IN PERSONAL ACTIONS.

PART I.

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By WILLIAM TIDD,  
Of the INNER TEMPLE.

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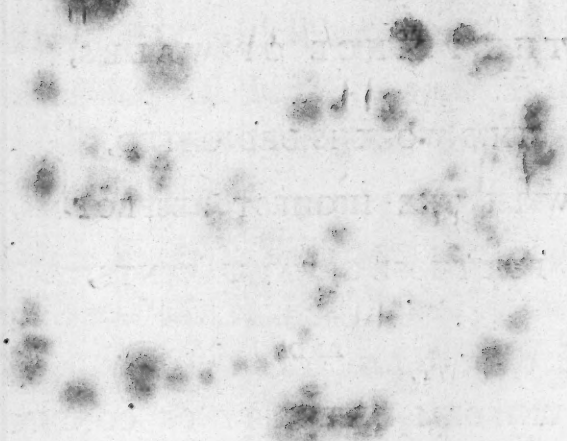
Court of King's Bench



TO THE  
HONORABLE  
THOMAS ERSKINE,  
ATTORNEY GENERAL TO HIS ROYAL HIGHNESS  
THE PRINCE OF WALES,  
THIS WORK IS DEDICATED,  
WITH THE HIGHEST RESPECT  
FOR THOSE GREAT TALENTS,  
AND  
THAT UNIFORM INTEGRITY OF CONDUCT,  
WHICH HAVE RENDERED HIM  
SO DISTINGUISHED AN ORNAMENT  
OF THE ENGLISH BAR.

THOMAS A. BRADY

THOMAS A. BRADY



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## P R E F A C E.

THE great length of time necessary for completing this work would have long delayed its publication: and therefore the author was induced to publish it in parts; which he has so divided, as that each of them may be separately useful, and at the same time subservient to his general plan.

The first part, which is now published, contains the whole of the proceedings in personal actions, previous to the plea; together with all that is peculiar to the proceedings by and against *attornies*, and other officers of the court; against *peers* of the realm, and *members* of the house of commons; upon the writ of *habeas corpus*; and  
against



against *prisoners*, in the actual custody of the marshal or sheriff, &c. In a second part, it is intended to continue the proceedings, from the plea to the final judgment: and in a third, to treat of the means of enforcing a judgment by *execution*; of reversing it by writ of *error*; and reviving it by *scire facias*; with the proceedings in *replevin*, &c.

The second and third parts are in a state of considerable forwardness: but on account of the author's professional avocations, it may be some years before they are published.

*Inner Temple,*  
Nov. 1, 1790.

# C O N T E N T S.

---

|                                                                                     | Page |
|-------------------------------------------------------------------------------------|------|
| CHAP. I.                                                                            |      |
| Of the Original Writ.                                                               | 1    |
| CHAP. II.                                                                           |      |
| Of the Process by Original.                                                         | 16   |
| CHAP. III.                                                                          |      |
| Of the Arrest.                                                                      | 28   |
| CHAP. IV.                                                                           |      |
| Of Outlawry.                                                                        | 55   |
| CHAP. V.                                                                            |      |
| Of the Proceedings by and against Attornies, and other Officers of the Court.       | 75   |
| CHAP. VI.                                                                           |      |
| Of the Proceedings against Peers of the Realm, and Members of the House of Commons. | 81   |
| CHAP.                                                                               |      |

|                                                                                                  | Page |
|--------------------------------------------------------------------------------------------------|------|
| CHAP. VII.                                                                                       |      |
| Of the Bill and Process in Trespass.                                                             | 85   |
| CHAP. VIII.                                                                                      |      |
| Of the Proceedings upon the CAPIAS, &c. previous to the Defendant's Appearance.                  | 99   |
| CHAP. IX.                                                                                        |      |
| Of Appearance.                                                                                   | 111  |
| CHAP. X.                                                                                         |      |
| Of Bail.                                                                                         | 121  |
| CHAP. XI.                                                                                        |      |
| Of the Proceedings upon the Bail-bond.                                                           | 153  |
| CHAP. XII.                                                                                       |      |
| Of the Proceedings against the Sheriff, to compel him to return the Writ, and bring in the Body. | 159  |
| CHAP. XIII.                                                                                      |      |
| Of the Writ of Habeas Corpus.                                                                    | 167  |
| CHAP. XIV.                                                                                       |      |
| Of the Bill against Prisoners, in the actual or supposed Custody of the Marshal;                 | 2    |

# CONTENTS. lx

|                                                                                   | Page |
|-----------------------------------------------------------------------------------|------|
| hal; and how far it is considered as<br>the Commencement of the Suit.     -     - | 186  |

## CHAP. XV.

|                                                                                                                      |     |
|----------------------------------------------------------------------------------------------------------------------|-----|
| Of the Proceedings against Prisoners in<br>the actual Custody of the Marshal, pre-<br>vious to the Plea.     -     - | 192 |
|----------------------------------------------------------------------------------------------------------------------|-----|

## CHAP. XVI.

|                                                                                                                          |     |
|--------------------------------------------------------------------------------------------------------------------------|-----|
| Of the Proceedings against Prisoners in<br>the actual Custody of the Sheriff, &c. pre-<br>vious to the Plea.     -     - | 198 |
|--------------------------------------------------------------------------------------------------------------------------|-----|

## CHAP. XVII.

|                                                                                                                               |     |
|-------------------------------------------------------------------------------------------------------------------------------|-----|
| Of the Proceedings against Prisoners in the<br>actual Custody of the Marshal or Sheriff,<br>&c. subsequent to the Plea.     - | 207 |
|-------------------------------------------------------------------------------------------------------------------------------|-----|

## CHAP. XVIII.

|                                                                                                                        |     |
|------------------------------------------------------------------------------------------------------------------------|-----|
| Of the Declaration by Original Writ,<br>and Bill against Defendants in the sup-<br>posed Custody of the Marshal.     - | 217 |
|------------------------------------------------------------------------------------------------------------------------|-----|

## CHAP. XIX.

|                                                                                                        |     |
|--------------------------------------------------------------------------------------------------------|-----|
| Of Imparlance, and Time for Pleading;<br>and of the Summons and Order for<br>further Time.     -     - | 239 |
|--------------------------------------------------------------------------------------------------------|-----|

## CHAP. XX.

|                                                            |     |
|------------------------------------------------------------|-----|
| Of the Rule to plead, and Demand of a<br>Plea.     -     - | 251 |
|------------------------------------------------------------|-----|

CHAP.



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Page 12

...

...

...

...

...

...

...

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## C H A P. I.

### Of the Original Writ.

**T**HE legal mode of redressing civil injuries is by action, which is real, personal, or mixed. In a *real* action, the proceedings are *in rem*, for the recovery of real property only; in a *personal* action, they are *in personam*, for the recovery of specific chattels, or of some pecuniary satisfaction or recompence; and in a *mixed* action, they are *in rem et personam*, for the recovery of real property, and damages for withholding it. In the following work, it is the author's intention to treat of the means of commencing and prosecuting a *personal* action, in the court of king's bench, by a methodical arrangement of the several acts of parliament, rules of court, and judicial decisions upon the subject.

The means of commencing a personal action in this court are—

B

I. By

## I. BY ORIGINAL WRIT.

II. BY ATTACHMENT OF PRIVILEGE, at the suit of the attornies and officers of the court.

III. BY BILL; which is fourfold;

1. Against the attornies and officers of the court.

2. Against peers, and members of the house of commons.

3. In trespass.

4. Against prisoners.

An *original writ* is a mandatory letter from the king in chancery, sealed with his great seal<sup>a</sup>; and lies in *all* personal actions, against every person not privileged as an attorney, officer, or prisoner of the court. Formerly, indeed, it was not usual to proceed in the king's bench by original writ, in *debt*, *detinue*, or other action of a mere civil nature<sup>b</sup>. But the modern practice is different<sup>c</sup>; and in a late case, where the defendant pleaded to the jurisdiction, in an action of *debt* commenced by original writ, the court gave judgment on demurrer for the plaintiff; and declared, that if such a plea should come before them again, they would inquire by whom it was signed.

<sup>a</sup> Finch, L. 237. 3 Blac. Com. 273.

*filizarii*, 55. 77. 3 Blac. Com. 42.

<sup>b</sup> 4 Inst. 76. Trye's *jus*

<sup>c</sup> Cas. temp. Hardw. 317.

On the other hand, an original writ was formerly the most common, if not the only ground of proceeding against *peers* and *members* of the house of commons<sup>a</sup>: but now, by statute 12 & 13 W. III. c. 3. §. 2. they may also be sued by original *bill*, and summons, attachment, and distress infinite. Still, however, an original writ is the only ground of proceeding against a *corporation*, or *hundredors*, on the statutes of hue and cry, &c.<sup>f</sup>; or where, by reason of the defendant's being abroad, or keeping out of the way, he cannot be arrested or served with process. There is also this benefit attending it, in other cases; that after judgment in an action by original, a writ of error will not lie in the exchequer chamber, where it is often brought for the mere purpose of delay, but only in parliament<sup>g</sup>. The reason is, that at common law, no writ of error lay, except in parliament, from the judgment of this court; and the statute<sup>h</sup> which gave a writ of error in the exchequer chamber, only extends to such actions as are *first* commenced in the king's bench: therefore, though a writ of error will lie in the exchequer chamber, on a judgment by *bill*, which originates in the

<sup>a</sup> Trye, 9. 13.<sup>f</sup> Trye, 11.<sup>e</sup> Say. Rep. 63. Cowp.<sup>g</sup> 1 Sid. 424. Trye, 6.

844. 2 Ld. Raym. 1442. 2

<sup>h</sup> 27 Eliz. c. 8.

Str. 734. S. C.



king's bench; yet, it is otherwise where the judgment is upon an *original* writ, which issues out of chancery, where the action in that case is first commenced<sup>1</sup>.

Original writs are calculated for the *commencement* or *removal* of actions<sup>k</sup>. And they are either *de cursu*, or *magistralia*<sup>l</sup>: the former were framed in the king's court, before the division of it; the latter were made out by the *masters* in chancery, pursuant to the statute of *Westm. 2. c. 24*. In personal actions, they are *ex contractu, vel ex delicto*<sup>m</sup>; upon contracts, or for wrongs, immediate or consequential.

ACTIONS UPON CONTRACTS are *assumpsit*, *covenant*, *debt*, *detinue*, &c. *Assumpsit* lies for the recovery of *damages* upon contracts, express or implied, *without deed*. Contracts of this nature relate to persons, personal property, and real property. Respecting *persons*, they are to forbear, indemnify, marry, serve, employ, &c. Respecting *personal* property, they are to buy, sell, exchange, accept, deliver, take back or warrant *cattle or goods*; to hire, lend, keep, take care of, or redeliver

<sup>1</sup> Run. Ej. 83, &c. Gilb. 670. 7 Co. 4. a. 8 Co. 48, K. B. 319.

<sup>k</sup> Trye, 1. 12. 93.

9. <sup>m</sup> 1 Bac. Abr. 26. Gilb.

<sup>l</sup> Gilb. K. B. 312. 1 Inst. C. P. 5.

54. b. 73. b. 2 Inst. 407.

them;

them; or to perform some work about them, as to carry, ship, &c.; to provide *necessaries*; to pay *money*, in consideration of precedent debts, (usually termed *indebitatus assumpsits*;) forbearance, indemnity, marriage, service, the sale, exchange and hire of goods, performance of works, necessities, or the sale, exchange, assignment, or use of lands, &c.; upon bills of exchange, foreign or inland, promissory notes, policies of assurance on lives or ships, &c. wagers, accounts stated, awards, bye-laws, or foreign judgments; and for tithes, tolls, port duties, fines and americiaments: to *repay* money; concerning *securities*; and to account. Respecting *real* property, they are to buy, sell, exchange, take, let, assign, hold, repair or quit lands, &c.—*Covenant* lies for the recovery of *damages* upon contracts *by deed*, as upon articles of agreement, charter parties of affreightment, indentures of apprenticeship, leases, mortgages, &c.—*Debt* lies for the recovery of a *sum certain* upon acts of parliament, judgments, statutes, recognizances, specialties, and simple contracts, express or implied.—*Detinue* lies, upon a delivery or finding, for the recovery of goods *in specie*, or damages for detaining them.

Actions for *WRONGS* are *trespasses, vi et armis*, for such as are immediate; and *actions on the case*, for such as are merely consequential.

Trespafs *vi et armis* lies to recover damages for *immediate* wrongs, to *persons*, by menaces, assault, battery, wounding, mayhem, or false imprisonment; to *personal* property, by injuring, taking away, detaining or converting cattle or goods; and to *real* property, as to houses, lands, fisheries, &c. Actions *on the case* lie to recover damages for *consequential* wrongs, or *torts*, arising from *malefeazance*, or doing what the defendant ought not to do; *non-feazance*, or not doing what he ought to do; and *misfeazance*, or doing what he ought to do, improperly. These actions are for *torts* to persons, personal property, and real property corporeal or incorporeal.—To *persons*, they are for *publick* nuisances, which occasion *private* inconvenience, keeping mischievous animals, *negligence* in riding horses, driving carriages, or navigating vessels<sup>n</sup>, &c. *unskilfulness* or improper conduct of *surgeons*, &c. malicious prosecutions, libels, *scandalum magnatum*, defamation of common persons, criminal conversation, and seducing, harbouring, taking away, imprisoning or beating wives or servants. To *personal* property, they are for *trover* and conversion, excessive or irregular distresses, rescues, pound-breaches, escapes, false returns, and other misconduct of sheriffs, &c.

<sup>n</sup>The wrongs here mentioned as affecting *persons*, may and do frequently affect *personal* property.



*deceit* on the sale of cattle or goods, or immoderate use of them when lent or let to hire; and against *carriers* by land or by water, *wharfingers*, *innkeepers*, *farriers*, &c. To *real* property *corporeal*, they are for *nusances*, of a *private* nature, to houses, lands, &c. to the prejudice of the plaintiff's possession or reversion; in nature of *waste*; for not repairing fences, or for not carrying away tithes, &c. And to *real* property *incorporeal*, they are for *disturbance* of commons, ways, offices, franchises, &c.

In actions upon *contracts*, the plaintiff may join, in the same writ, different causes of action in *assumpsit*, or in *covenant*, *debt*<sup>o</sup>, or *detinue*; and he may join *debt* and *detinue* in the same writ<sup>p</sup>. But he cannot join *assumpsit* with *covenant*, nor *debt* or *detinue* with either of them. In actions for *wrongs*, he may join different causes of action in *trespass*, or in *case*. But he cannot join *trespass* with *case*, nor either of them with any species of contract. There are however some causes of action, for which the plaintiff may bring *assumpsit* or *case*, as for *deceit* on the sale, or immoderate use, of cattle or goods, and against carriers<sup>q</sup>, &c. And there are some wrongs of so peculiar a nature, that they may be considered either as *torts* or *tres-*

<sup>o</sup> 1 Will. 248.<sup>q</sup> 2 Will. 319.<sup>3</sup> Will.<sup>p</sup> Gilb. C. P. 5. 1 Bac. Abr. 30. 348. 1 T. R. 274.



*passes*: such are *criminal conversation*, or for taking away, imprisoning or beating the plaintiff's wife or servant, *per quod consortium vel servitium amisit*. These wrongs are not immediate, but consequential; the plaintiff may declare for them by bill with a *quod cum*, which is not allowed in *trespass*<sup>r</sup>; the plea of the statute of limitations is not guilty within *six years*<sup>s</sup>, and not, as in *trespass* and *assault*, within *four years*; and though the plaintiff should not recover forty shillings *damages*, he is nevertheless entitled to full *costs*<sup>t</sup>. For these reasons, they may be considered as *torts*. But yet, as they are attended with violence, they may also be considered as *trespasses vi et armis*: and they may be joined in the same writ with either; not for the reason given in the books<sup>u</sup>, that a general action of *trespass* and a special action upon the case may be joined in the same writ, but because, from the peculiar nature of the wrongs, they may be made the subjects of either action. And hence, there is a writ *de uxore abductâ, cum bonis viri*<sup>v</sup>; and it is usual to join a *rescue* and *trespass*<sup>w</sup>, &c.

The original writ is issued by the *cursitor*, who is so called from the writs *de cursu*; and,

<sup>r</sup> 2 Salk. 636. 1 Str. 621.

<sup>s</sup> 2 Bur. 753.

<sup>t</sup> 1 Salk. 206. 3 Will.

<sup>u</sup> Aleyn, 9. 1 Bac. Abr. 30.

<sup>v</sup> F. N. B. 89.

<sup>w</sup> 2 Lutw. 1249.

where the plaintiff's demand exceeds forty pounds, a *fine* is payable to the king, by way of composition for the liberty of suing in his court<sup>x</sup>; which fine is estimated according to the amount of the demand, being six shillings and eightpence for every hundred marks, or ten shillings for every hundred pounds<sup>y</sup>.

In actions of *covenant*, *debt*, and *detinue*, the original writ is called a *præcipe*; by which the defendant has an *option* given him, either to do what he is required, or shew cause to the contrary: but in *assumpsit*, and actions for wrongs, it is called a *pone*, or *si te fecerit securum*; by which the defendant is *peremptorily* required to shew cause, in the first instance<sup>z</sup>. In point of form, the original writ is special or general, *nominatum vel innominatum*<sup>a</sup>. The former contains the time, place, and other circumstances of the demand, very particularly; the latter, only a general complaint, without expressing the particulars, as the writ of trespass *quare clausum fregit*, &c. But in order to save the great and unnecessary expence of suing forth *special* writs, in small and trifling suits, it is enacted<sup>b</sup>, that "no

<sup>x</sup> Gilb. C. P. 7.

<sup>y</sup> Trye, 58, 9.

<sup>z</sup> Finch, L. 257.

<sup>a</sup> 1 Bac. Abr. 29. Gilb.

C. P. 3.

<sup>b</sup> Stat. 5 G. II. c. 27. § 5.

<sup>3</sup> Bur. 1484.

" special

"special writ or process shall be issued out of  
 "any superior court, where the cause of ac-  
 "tion shall not amount to the sum of ten  
 "pounds or upwards." And by a late rule<sup>c</sup>,  
 "in all actions, in which the plaintiff shall  
 "proceed against the defendant by special ori-  
 "ginal writ, and shall recover less than the sum  
 "of fifty pounds, he shall not, on taxing costs,  
 "be allowed any more or other costs, than he  
 "would be intitled to, in case he had pro-  
 "ceeded by bill; except in such actions, in  
 "which he could not proceed by bill, or in  
 "which any defendant shall be actually out-  
 "lawed."

The original writ should be *directed* to the  
 sheriff or sheriffs of the county where the action  
 is brought, and intended to be tried: and the  
 VENUE should be laid in that county. But  
 there is a distinction between local and transi-  
 tory actions<sup>d</sup>. Where the action could only  
 have arisen in a *particular* county, it is *local*,  
 and the venue must be laid in that county;  
 for if it be laid elsewhere, the defendant may  
 demur to the declaration<sup>e</sup>, or the plaintiff,  
 on the general issue, will be nonsuited at  
 the trial<sup>f</sup>. But where the action might have

<sup>c</sup> R. M. 23 G. III.

<sup>e</sup> 1 Wils. 165.

<sup>d</sup> Gilb. C. P. 84. Cowp.

<sup>f</sup> Cowp. 410. 2 Blac. Rep.

176, &c.

1033.



arisen in *any* county, it is *transitory*, and the plaintiff may, in general, lay the venue wherever he pleases<sup>z</sup>; subject to its being changed by the court, if not laid in the *very* county where the action arose. Thus, in an action upon a lease for rent, &c. founded on the privity of *estate*, as in *debt* by the assignee<sup>b</sup> or devisee<sup>1</sup> of the lessor against the lessee, or by the lessor<sup>k</sup>, or his personal representatives<sup>l</sup>, against the assignee of the lessee, or against the executor of the lessee in the *debet* and *detinet*<sup>m</sup>, or in *covenant* by the grantee of the reversion against the assignee of the lessee<sup>n</sup>, the action is *local*; and the venue must be laid in the county where the estate lies. But in an action upon a lease for rent, &c. founded on the privity of *contract*, as in *debt* by the lessor against the lessee<sup>o</sup>, or his executor in the *detinet* only<sup>p</sup>, or in *covenant* by the lessor<sup>q</sup> or grantee of the reversion<sup>r</sup> against the lessee, the

<sup>z</sup> Gilb. C. P. 84. 336. 1 Salk. 80. 1 Show.

<sup>b</sup> Cro. Car. 183. 1 Willf. 191. S. C. 6 Mod. 194.  
165. S. P.

<sup>1</sup> W. Jon. 43. <sup>o</sup> 6 Mod. 194. 2 Str.

<sup>k</sup> 6 Mod. 194. 776.

<sup>l</sup> Latch, 197. <sup>p</sup> Gilb. Debt, 403. Gilb.

<sup>m</sup> 2 Lev. 80. 3 Keb. 135. C. P. 91.

S. C. Gilb. Debt, 403. <sup>q</sup> 3 Lev. 154.

Gilb. C. P. 91. <sup>r</sup> 1 Saund. 238. Carth. 183.

<sup>p</sup> Carth. 182. 3 Mod. 1 Willf. 165.

action



action is *transitory*; and the venue may be laid in any county, at the option of the plaintiff. There are, however, some actions, of a *transitory* nature, wherein the venue must be laid in a particular county. Such are *all* actions upon penal statutes<sup>1</sup>; and actions upon the *case*, or *trespass* against justices of peace, mayors or bailiffs of cities or towns corporate, head-boroughs, portreves, constables, tithingmen, churchwardens, &c. or other persons acting in their aid and assistance, or by their command, for any thing done in their official capacity<sup>2</sup>; and also actions against any person or persons, for any thing done by an officer or officers of the *excise*<sup>3</sup> or *customs*<sup>4</sup>; or others acting in his or their aid, in execution, or by reason of his or their office. In these actions, the venue, by various acts of parliament, must be laid in the county where the facts were committed, and not elsewhere. On the other hand, the venue in a *transitory* action is in some cases *altogether optional* in the plaintiff; as where the action arises in *Wales*<sup>5</sup>, or beyond the sea<sup>6</sup>, or is brought upon a bond

<sup>1</sup> Stat. 21 Jac. I. c. 4.  
f. 2. 1 Sid. 287.

<sup>2</sup> Stat. 21 Jac. I. c. 12. f. 5.

<sup>3</sup> 20 G. III. c. 70. f. 34.

<sup>4</sup> 24 G. III. Sess. 2. c.  
47. f. 35.

<sup>5</sup> 2 Str. 1258. 1 Will.  
138. S. C.

<sup>6</sup> Say. Rep. 77. Cowp. 176.

or other specialty<sup>y</sup>, promissory note, or bill of exchange<sup>z</sup>, for *scandalum magnatum*<sup>a</sup>, or a libel dispersed throughout the kingdom<sup>b</sup>, against a carrier or lighterman<sup>c</sup>, for an escape<sup>d</sup> or false return<sup>e</sup>; and in short, wherever the cause of action is not wholly and necessarily confined to a single county<sup>f</sup>. In these cases, the venue cannot be changed by the court, but upon a special ground<sup>g</sup>.

The original writ, issuing out of chancery, should be teste'd or witnessed in the king's name at Westminster, or wherever else the chancery is holden<sup>h</sup>; and as that court is supposed to be always open, it may be tested in vacation as well as in term time<sup>i</sup>. It should, however, be always teste'd after the cause of action

<sup>y</sup> 1 Keb. 65. 1 Sid. 87. T. R. 306. 652.  
 Sty. P. R. 631. 2 Str. 878. <sup>c</sup> 2 Salk. 670.  
 Andr. 66. R. M. 10 G. II. <sup>d</sup> 1 Keb. 65. 1 Sid. 87.  
 (c) Gilb. K. B. 339. Gilb. 2 Salk. 670.  
 C. P. 90. *Balein v. Kent*, <sup>e</sup> 2 Salk. 669. 2 Str.  
 E. 20 G. III. 727. Say. Rep. 54. 1 Wils.  
<sup>z</sup> Andr. 66. R. M. 10 336. S. C.  
 G. II. (c) 1 T. R. 571. *Pre-* <sup>f</sup> 2 Salk. 669. R. M. 10  
*cious v. Bennet*, E. 25 G. III. G. II. (c) 1 Wils. 178. 2  
 But see 1 Wils. 41. Say. Rep. T. R. 275.  
 7. *contra*. <sup>g</sup> *Pole v. Horobin*, M. 22 G.  
<sup>a</sup> 1 Lev. 56. 2 Salk. III. 1 T. R. 781.  
 668. Carth. 400. S. C. 2 <sup>h</sup> Finch, L. 237. 3 Blac.  
 Str. 807. Barnes, 482. Com. 274.  
 Gilb. C. P. 50. <sup>i</sup> Trye, 59, 60. Sty. Rep.  
<sup>b</sup> 1 T. R. 571. 647. 3 402. 3 Keb. 214.

accrued;

accrued<sup>k</sup>; and should be made returnable on a general return day in term time, *ubique*, or wheresoever the king shall then be in England<sup>l</sup>. In proceeding to outlawry, if the instructions be carried to the curfitor within the first week of a term, and the cause of action will admit of it, he will, for the sake of expedition, make the original returnable on the first or any other return of the preceding term<sup>m</sup>. Otherwise it is usually made returnable in the same or the next term; or, as it does not affect the liberty of the defendant, it may be made returnable at the distance of two or three terms<sup>n</sup>. But there should be fifteen days, at least, between the *teste* and return of an original<sup>o</sup>; the law requiring that distance of time between the *service* and return of it; though if there be less, it will be aided by the defendant's appearing and pleading in chief<sup>p</sup>.

The *want* of an original is aided after verdict, by the statute 18 *Eliz.* c. 14. but not after judgment by default, &c. And a *bad* original is not aided, even after verdict; nor a *good* one, which does not warrant the declara-

<sup>k</sup> 2 Bur. 967.

<sup>l</sup> Trye, 2.

<sup>m</sup> Id. 60.

<sup>n</sup> Dyer, 175.

<sup>o</sup> 2 Inst. 567. Booth on

real actions, 5. Gilb. C. P.

9. 3 Blac. Com. 275.

<sup>p</sup> 1 Salk. 63. 1 Ld.

Raym. 671. S. C.

tion.



tion. The court, however, will *amend* any defect in the original, arising from the misprision of the clerk, in not pursuing his instructions; or from his nescience in form, though not in substance.

15 Co. 137. b. Cro. El. 12. 8 Co. 159. Gilb. C. 722. 1 Sid. 84. P. 117. Barnes, 10. 16. 22. Stat. 8 Hen. VI. c.

The writ of an original is aided after verdict, by the statute 18 Edw. c. 14. but not by default &c. And a bad original is not aided, even after verdict; not a good one, which does not warrant the declaration.

CHAP.

15 Co. 137. b. Cro. El. 12. 8 Co. 159. Gilb. C. 722. 1 Sid. 84. P. 117. Barnes, 10. 16. 22. Stat. 8 Hen. VI. c.

15 Co. 137. b. Cro. El. 12. 8 Co. 159. Gilb. C. 722. 1 Sid. 84. P. 117. Barnes, 10. 16. 22. Stat. 8 Hen. VI. c.



## C H A P. II.

## Of the Process by Original.

THE next thing to be considered is the *process*, or means of compelling the defendant's appearance upon the original. In all personal actions, except trespass *vi et armis*, or for injuries tending to a breach of the peace, as deceit and conspiracy, the first proceeding upon the original, is a *summons*<sup>a</sup>, or warning to appear, according to the exigency of the writ.

The defendant being summoned, was formerly allowed to cast an *essoins*<sup>b</sup>, or send an excuse by his servant for not appearing; and that being done, it was the plaintiff's duty to adjourn it to some day, appointed by the court, in the next term<sup>c</sup>: if he did not, he was liable to be *nonpros'd*<sup>d</sup>. But no *essoins* was ever allowed in personal actions, on the return of a *capias*<sup>d</sup>; nor even on a summons, where the defendant was seen in court, or appeared by attorney<sup>e</sup>: and as a corpora-

<sup>a</sup> Finch, L. 305. 352. C. P. 13.

<sup>b</sup> 2 Inst. 125. b. 137.

<sup>d</sup> 2 Str. 1194.

<sup>c</sup> Cro. Eliz. 367. Gilb.

<sup>e</sup> 2 Wils. 165.

tion

tion aggregate could not appear in any other manner, they were not entitled to an effoin<sup>f</sup>. At this day, the defendant being in general at liberty to appear by attorney, no effoin is allowed in any *personal* action whatsoever, even where a peer or member of parliament is defendant<sup>g</sup>. Where an effoin is cast, and neither quashed nor adjourned to a particular day, the plaintiff may declare the first day of the next term, and the defendant is not intitled to an imparlance<sup>h</sup>.

If an effoin be not cast, where it is allowable, on the very return day of the original writ, the plaintiff may enter his exception the next day, and obtain an order that it be not received<sup>i</sup>; and from this exception, so taken and entered, the second day after the return of the writ is called the day of exception. The third day the sheriff should regularly return his writs into court, which are delivered to the *custos brevium*; and from thence this day is called the day of *retorna brevium*: and then it is, that the court is seized of the cause, by possession of the writ. The fourth day is called the appearance day, or *dies amoris*<sup>k</sup>, which is the day given *ex gratia curiæ* for the defendant's appearance. If the defendant appear on or

<sup>f</sup> Bro. abr. tit. *Corporation*, 28. Cas. pr. C. P. 8.

<sup>g</sup> 2 T. R. 16.

<sup>h</sup> Id. *ibid*.

<sup>i</sup> Gilb. C. P. 13.

<sup>k</sup> Co. Lit. 135. a.

before the *quarto die post* of the return of the original, he should enter his appearance with the *filacer*, who is so called from the *files* of the *custos brevium*, which are warrants for him to continue the process<sup>1</sup>. If he make default, and the sheriff return that he is summoned, the filacer issues an *attachment*; which is a judicial writ, commanding the sheriff to put the defendant by gages and safe pledges; that is, to take certain of his goods, which are forfeited if he do not appear, or to make him find personal pledges or sureties, who shall be amerced in case of his non-appearance<sup>m</sup>. And this is the first and immediate proceeding upon the original in trespass *vi et armis*<sup>n</sup>, &c. where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any previous warning.

The sheriff's return to the attachment is, either that he has attached the defendant, or that he has nothing by which he can be attached. If the defendant, being attached, still neglect to appear, the plaintiff may proceed, to compel his appearance, by *distringas*, or distress infinite; which is a process commanding the she-

<sup>1</sup> Gilb. C. P. 14. Trye, Ej. 45, 6. 3 Blac. Com. 280.  
*in pref.*

<sup>n</sup> Finch, L. 355.

<sup>m</sup> Gilb. distr. 18, &c. Run.



riff to distrain the defendant, by all his lands and chattels, and to answer for the *issues*°, or profits of the same. Upon the first *distringas*, the sheriff usually returns issues to the amount of forty shillings; and if the defendant do not appear before or on the *quarto die post* of the return, the plaintiff should sue out an *alias distringas*, and thereupon move the court to increase the issues; a proceeding that seems to have come in lieu of the writ of averment<sup>p</sup>. In general, if the debt be small, the court will order issues to be returned at once to the amount of it: but otherwise, on the defendant's non-appearance, the plaintiff should sue out a *pluries distringas*, and move the court a second time, and so *toties quoties*, until issues be returned to the amount of the debt. When that is done, the plaintiff should apply to the court, for a sale of the issues, under the statute 10 Geo. III. c. 50. which enacts, that “ the court, out of  
 “ which the writ proceeds, may order the  
 “ issues, levied from time to time, to be sold,  
 “ and the money arising thereby to be applied, to pay such costs to the plaintiff, as  
 “ the said court shall think just, under all the  
 “ circumstances, to order; and the surplus to  
 “ be retained until the defendant shall have

° Finch, L. 352. Stat. 5 Mod. 117.

Westm. 2. c. 39. 2 Inst. 453.

<sup>p</sup> *Thef. brev.* 144, 5.



“ appeared, or other purpose of the writ be answered :” which statute has been construed to extend to all writs of *distingas*, and not to be confined to such as concern privilege of parliament only <sup>a</sup>.

The method of proceeding, by summons, attachment, and distress infinite, is not affected by the statutes for preventing frivolous and vexatious arrests<sup>b</sup>, which only relate to process against the *person*. It may therefore still be used to advantage, where the defendant has *property*, but cannot be arrested or served with process : and it is the *only* method of proceeding against *peers*<sup>c</sup>, *members* of the house of commons<sup>d</sup>, *corporations*<sup>e</sup>, and *hundredors* on the statutes of hue and cry<sup>f</sup>, &c.

In proceeding against a *peer* or *member* of the house of commons, the *original* should issue into that county where the defendant lives ; and a copy of it is usually made out by the plaintiff's attorney for the sheriff, and served as the *summons* on the defendant<sup>g</sup>. Before or

<sup>a</sup> 5 Bur. 2726, 7.

<sup>h</sup> Com. Dig. tit. *Pleader*,

<sup>b</sup> 12 G. I. c. 29. 5 G. II. 2 B. 2. 6 Mod. 183.

c. 27. Barnes, 407, 8, 9.

<sup>v</sup> 3 Keb. 126.

<sup>d</sup> Gilb. K. B. 309. 6 Co.

<sup>w</sup> 2 Crompt. 146. And it

52. 9 Co. 49. Sty. rep. 222.

is said, that a peer or peer-

1 Vent. 298.

ess cannot be *attached*, but

<sup>t</sup> 2 Str. 985. Com. Rep.

should be brought in by

444.

*summons*. 1 Str. 225.

on the *quarto die post* of the return of the original, the defendant either appears or makes default; for he cannot cast an effoin<sup>x</sup>. If he make default, the plaintiff should sue out a *distringas*<sup>y</sup>, and after that (if necessary) an *alias* or *pluries distringas*; upon which he may move to increase and sell the issues, as before directed. Or if the sheriff return upon the *distringas*, &c. that the defendant hath nothing by which he can be distrained, the plaintiff may have a *testatum distringas* into another county<sup>z</sup>.

The *distringas* and other subsequent process upon the original, state the cause of action at large<sup>a</sup>; and must be made returnable on a general return day, *ubicunque*, or *wheresoever* the king shall then be in England. Each succeeding writ must be teste'd on the *quarto die post* of the return of the preceding one; and there must be fifteen days at least between the teste and return.

If the defendant appear, upon any of these writs, he should enter his appearance with the filacer<sup>b</sup>; and when the purpose of the writ is thus answered, "the issues (if any have been levied) shall be returned; or if sold, what shall remain of the money arising by such sale

<sup>x</sup> *Ante*, 17.

<sup>y</sup> Trye, 9.

<sup>z</sup> *Id.* 10. 127.

<sup>a</sup> Trye, 127.

<sup>b</sup> Impey, 425.

“ ſhall be repaid to the party diſtrained upon<sup>e</sup>.” But the plaintiff in ſuch caſe is entitled to his coſts : and where he had obtained rules for ſelling the iſſues levied upon a *diſtringas*, *alias*, and *pluries*, and alſo a rule for an attachment againſt the ſheriff, but the defendant appeared *before any iſſues had been actually levied*, the court ordered, that upon payment of the coſts of iſſuing the writs, the rules ſhould be diſcharged ; being of opinion that theſe coſts were not to abide the event of the ſuit, but were to be paid to the plaintiff immediately, and at all events, whether he ſhould finally ſucceed in the ſuit or not<sup>d</sup>.

In proceeding againſt a *corporation*, the proceſs ſhould be ſerved on the mayor, or other head officer<sup>e</sup> : and if the defendants do not appear before or on the *quarto die poſt* of the return of the original, by an attorney appointed under their common ſeal, (for they cannot appear in perſon<sup>f</sup>;) the next proceſs is a *diſtringas*, which ſhould go againſt them in their public capacity<sup>g</sup> : and under this proceſs, the ſheriff may diſtrain the lands and goods which conſtitute the common ſtock of the corporation<sup>h</sup>. If

<sup>e</sup> Stat. 10 G. III. c. 50. Chan. 131. 1 Chan. Caſ. 206, f. 4.

<sup>f</sup> *Poſt*.

<sup>d</sup> 5 Bur. 2725.

<sup>g</sup> 1 Ventr. 351.

<sup>e</sup> Sty. Rep. 367. Prec. in

<sup>h</sup> Skin. 27.

they

they have neither lands nor goods, there is no way to compel them to appear at law or in equity<sup>i</sup>, but only in parliament<sup>k</sup>: for it is a rule, that for a public concern, the sheriff cannot distrain any private person, who is a member of the corporation<sup>l</sup>.

In proceeding against *hundredors*, on the statutes of hue and cry, the process might have been formerly served on any inhabitant of the hundred. But now by statute<sup>m</sup>, “no process  
“for appearance, in any action to be brought  
“upon the statutes of hue and cry, or either  
“of them, against any hundred, shall be  
“served on any inhabitant thereof, save only  
“upon the high constable or high constables  
“of the hundred, wherein the robbery shall  
“happen; who is and are required to cause  
“publick notice thereof to be given, in one of  
“the principal market towns within such hundred, on the next market day after he or  
“they shall be served with such process; or  
“if there shall happen to be no market town  
“within the hundred, then in some parish  
“church within the same hundred, immediate-

ld. 1 Vern. 122. Skin. 135. 1 Vent. 351. Cowp. 85.  
84. S. C. 2 Vern. 395. Styles, 367. *contra*; and see  
Prec. in Chan. 129. S. C. 1 Lev. 237. Finch, R. 83, 4.  
<sup>k</sup> 1 Chan. Caf. 204. S. C.

<sup>l</sup> Bro. Abr. tit. *Trespas*, <sup>m</sup> 8 G. II. c. 16. § 4.



“ ly after divine service, on the Sunday next  
 “ after his or their being served with such pro-  
 “ cesss : and he or they is and are required and  
 “ impowered to enter, or cause to be entered,  
 “ an appearance in the said action, and also  
 “ defend the same, for and on behalf of the  
 “ inhabitants of the said hundred, as he or  
 “ they shall be advised.”

At common law, the defendant was not liable to be arrested, for civil injuries unaccompanied with force<sup>n</sup>. This immunity of the defendant's person, in case of peaceable, though fraudulent injuries, producing great contempt of the law, in indigent wrong-doers, a *capias* was allowed to arrest the person, in actions of *account*, though no breach of the peace were suggested, by the statutes of Marlbridge, 52 Hen. III. c. 23. and Westm. 2. 13 Edw. I. c. 11. in actions of *debt* and *detinue*, by statute 25 Edw. III. c. 17. and in all actions *on the case*, by statute 19 Hen. VII. c. 9.<sup>o</sup> These statutes do not extend to peers, members of the house of commons, corporations, or hundredors : therefore we have seen<sup>p</sup>, that, as against them, the only method of proceeding is by summons, attachment, and distress infinite; and by statute 7 Ann. c. 12. § 3.

<sup>n</sup> 3 Co. 12.

<sup>p</sup> *Ante*, 20.

<sup>o</sup> 3 Blac. Com. 281.

“ all

“ all writs and process against the person or  
 “ goods of an *ambassador* or other *publick mi-*  
 “ *nister* of a foreign prince or state, or the do-  
 “ mestick *servant* of such ambassador or pub-  
 “ lick minister, shall be utterly null and void,  
 “ to all intents and purposes whatsoever.”

Where a *capias* lies, it is now generally issued in the first instance, without previously suing out the original; in like manner as in chancery, the *subpoena* issues, without first bringing in the bill<sup>a</sup>. The *capias* is a judicial writ, issued by the filacer, and directed to the sheriff or sheriffs of the same county as the original; commanding them to take the defendant, if he be found in their bailiwick, and safely keep him, so that they may have his body in court, at the return of the writ, to answer the plaintiff in the action: and it is usually called a special *capias ad respondendum*. If the sheriff's return to this writ, that the defendant is not found in their bailiwick, the plaintiff may have an *alias* or *pluries capias*, directed to the same sheriffs, commanding them as *before*, or as *oftentimes* they have been commanded, to take the defendant, &c.: or he may have a *testatum capias*, directed to the sheriffs of a different county, (and afterwards, if necessary, an *alias testatum capias*,) suggest-

<sup>a</sup> Trye, 59.

ing that the defendant lurks and wanders in that county. In any of these writs, if the defendant be within a liberty, it is usual to insert a clause of *non omittas*. So that, by a combination of circumstances, it may be necessary for the plaintiff to have recourse to an *alias* or *pluries testatum, non omittas, capias ad respondendum*, which is the most complex writ against the defendant's person; and commands the sheriffs, as *before*, or as *oftentimes* they have been commanded, not to *omit*, by reason of any liberty, but to *take* the defendant, &c. it being *testified* that he lurks and wanders in their county.

The process upon the original should be teste'd in the name of the chief justice, or senior judge of the court, if there be no chief justice. The *capias* should regularly be teste'd, in term time, on the *quarto die post* of the return of the original<sup>r</sup>, but not on a Sunday, or other *dies non juridicus*<sup>s</sup>; and each succeeding writ should be teste'd on the *quarto die post* of the return of the preceding one. But unless the defendant mean to proceed to outlawry, the *capias* may be teste'd before the original, and even before the cause of action accrued, provided it be actually taken out afterwards; for

<sup>r</sup> But see Trye, 59, 184.    <sup>s</sup> Trye, 191.  
&c. *semb. contra.*

no error can be assigned on mesne process<sup>t</sup>, and the defendant cannot haveoyer of the *capias*, so as to plead it in abatement<sup>u</sup>. These several writs must be made returnable, like the original, on a general return day, in term time, *ubicunque*, or *wheresoever* the king shall then be in England; and there must be at least fifteen days between the teste and return<sup>v</sup>. They must be returnable however in the same, or the next term; for where a whole term intervenes, between the teste and return of a *capias*, it is null and void<sup>w</sup>.

<sup>t</sup> 3 Wils. 434.

but see 3 Wils. 454. 2 Blac.

<sup>u</sup> *Per cur.* E. 18 G. III. Rep. 918. S. C.

<sup>z</sup> Crompt. 42.

<sup>w</sup> 2 Blac. Rep. 846.

<sup>y</sup> Trye, 60. 2 Wils. 117.



## C H A P. III.

## Of the Arrest.

I Shall next proceed to shew in what cases the defendant may, or may not be arrested, upon the *capias*, &c. And it should be remembered, that what is here said is not confined to proceedings by *original*, but applies equally to those by *bill* in trespass.

Before the making of the statute 12 Geo. I. c. 29. a defendant might have been arrested for any sum of money, however trifling or considerable, upon a mere suggestion, without any affidavit, of its being due. To remedy which, it was enacted by the said statute, *amended* by the 5 G. II. c. 27. *made perpetual* by the 21 G. II. c. 3. and extended to *inferior* courts by the 19 G. III. c. 70. that “ in all cases,  
 “ where the cause of action shall not amount  
 “ to the sum of *ten pounds* or upwards, and  
 “ the plaintiff or plaintiffs shall proceed by  
 “ way of process against the person, he, she,  
 “ or they, shall not arrest, or cause to be  
 “ arrested, the body of the defendant or defendants; but shall serve him, her, or them,  
 “ personally,

“ personally, within the jurisdiction of the  
“ court, with a copy of the process; upon  
“ which shall be written an English notice to  
“ such defendant, of the intent and meaning  
“ of such service; for which no fee or reward  
“ shall be demanded or taken: provided ne-  
“ vertheless, that in particular franchises and  
“ jurisdictions, the proper officer there shall  
“ execute such process.”

“ That in all cases, where the plaintiff's  
“ cause of action shall amount to the sum of  
“ *ten pounds* or upwards, an *affidavit* shall  
“ be made and filed of such cause of action;  
“ which affidavit may be made before any  
“ judge or commissioner of the court, out of  
“ which such process shall issue, authorised to  
“ take affidavits in such court, or else before  
“ the officer who shall issue such process, or  
“ his deputy; which oath such officer or his  
“ deputy are impowered to administer; and  
“ for such affidavit one shilling, over and  
“ above the stamp duties, shall be paid, and  
“ no more: and the sum or sums, specified in  
“ such affidavit, shall be indorsed on the back  
“ of such writ or process; for which sum or  
“ sums, so indorsed, the sheriff or other of-  
“ ficer, to whom such writ or process shall be  
“ directed, shall take bail, and for no more.”

“ And

“ And that if any writ or process shall issue  
 “ for the sum of *ten pounds* or upwards, and  
 “ no affidavit and indorsement shall be made  
 “ as aforesaid, the plaintiff or plaintiffs shall  
 “ not proceed to arrest the body of the de-  
 “ fendant or defendants, but shall proceed in  
 “ like manner (except as to the notice) as  
 “ is directed in cases where the cause of ac-  
 “ tion does not amount to the sum of *ten*  
 “ *pounds* or upwards.”

Upon these statutes, which at present wholly regulate the doctrine of arrest, there are three ways of proceeding; *first*, where the cause of action does not amount to 10 l.: *secondly*, where it amounts to 10 l. or upwards, and an affidavit is made thereof: *Thirdly*, Where it amounts to 10 l. or upwards, and there is no affidavit: in the first and last of these cases the defendant cannot be arrested, but must be personally served with a copy of the process; upon which there should be a notice to appear, in the first case, but not in the last.

Where the cause of action amounts to 10 l. or upwards, and an affidavit is made thereof, the defendant may in general be arrested, and holden to special bail. But by a statute<sup>a</sup> made previous to, and not repealed or altered

<sup>a</sup> 11, 12 W. III. c. 9. s. 2.

by, the 12 G. I. c. 29.<sup>b</sup> “no sheriff shall  
 “hold any person to special bail, in *Wales*  
 “or the *counties palatine*, upon any process  
 “issuing out of the courts at Westminster,  
 “unless an affidavit be first made and filed,  
 “of the cause of action, and that the same is  
 “20l. and upwards: and bail shall not be  
 “taken for more than the single sum expressed  
 “in the affidavit.” By a subsequent statute<sup>c</sup>,  
 “no *volunteer seaman* shall be liable to be  
 “taken out of his majesty’s service, but for a  
 “real debt, or other just cause of action,  
 “whereof an affidavit shall be made, to the  
 “amount of 20l. at the least.” And *volun-*  
*teer soldiers* are put upon the same footing,  
 by the annual mutiny acts; which have been  
 construed to extend, not merely to common  
 soldiers, and troopers<sup>d</sup> in the life guards, &c.  
 but also to non-commissioned or warrant offi-  
 cers, as gunners<sup>e</sup>, serjeants, and drummers<sup>f</sup>:  
 For, by *Dennison J.*<sup>g</sup> “a *serjeant* is a soldier  
 “with a halbert; and a *drummer* is a soldier  
 “with a drum.” These acts, however, do  
 not extend to soldiers, imprisoned for disobey-  
 ing orders of justices<sup>h</sup>, or on any other *crimi-*

<sup>b</sup> 2 Str. 1102.<sup>f</sup> 1 Wilf. 216. 1 Blac.<sup>c</sup> 1 G. II. c. 14. s. 15.

Rep. 29. S. C.

<sup>d</sup> 1 Str. 2. Say. Rep. 107.<sup>g</sup> 1 Blac. Rep. 30.<sup>e</sup> 1 Str. 7.<sup>h</sup> 2 T. R. 270.



*nal* account. By other acts of parliament<sup>1</sup>, for the speedy and effectual recruiting of his majesty's land forces and marines, "no person, *lifted* by virtue of those acts, shall be liable to be taken out of his majesty's service, by any process, other than for some criminal matter." But these latter acts were only meant to privilege such persons as were compelled to serve against their will<sup>k</sup>; or rather, to prevent their being taken out of the service, by means of *feigned* actions.

Where there is a certain *debt*, to the amount of 10 l. or upwards, or *damages* to that amount, which may be reduced to a certainty, as in *assumpsit* or *covenant* for the payment of money<sup>1</sup>, the arrest is *of course*, on a concise affidavit, adapted to the cause of action. But where the damages are *uncertain*<sup>m</sup>, as in *assumpsit* or *covenant* to indemnify, &c. or for a *tort* or *trespass*, there can be no arrest, without a *special order* of the court or a judge, on a full affidavit of the circumstances; for it would be unreasonable that the defendant should be arrested, for what damages the plaintiff fancies he has sustained, and is pleased to swear to. And it is not usual to grant a special order,

<sup>1</sup> 29 G. II. c. 4. f. 14.

<sup>1</sup> Barnes, 79, 80.

<sup>30</sup> G. II. c. 8. f. 20.

<sup>m</sup> Id. 108.

<sup>k</sup> 1 Bur. 339. 466.

except

except where there has been an outrageous battery or mayhem, or the defendant is about to quit the kingdom.

There are some cases, however, by way of exception to this doctrine, where the defendant may be arrested *of course*, in an action for uncertain damages<sup>n</sup>; or where, though the action be brought for a sum certain, he cannot be arrested. Of the former kind is *trover*; of the latter, *debt* on penal statutes, &c.

In an action of *trover*, the defendant may be arrested *of course*<sup>o</sup>, though the action be brought for uncertain damages; for this is more an action of property, than a *tort*. But it is said<sup>p</sup>, that where the defendant, being a custom-house officer, was arrested in an action of *trover*, brought against him for seizing goods, and it appeared by affidavit there was a reasonable foundation for the seizure; that the goods were deposited in the king's warehouse, and that the defendant had used due diligence, in proceeding towards a condemnation in the exchequer, the court ordered common bail to be accepted.

<sup>n</sup> Yelv. 53.

and see Cowp. 529.

<sup>o</sup> 6 Mod. 14. 2 Str. 1192.

<sup>p</sup> 2 Blac. Rep. 1018. 1

1 Wils. 23. S. C. 1 Wils. 335. Say. Rep. 53. S. 335. Say. Rep. 53. S. C. C. *Semb. contra.*

In an action of *debt* on a *penal* statute<sup>1</sup>, the defendant cannot be arrested, though it be for a sum certain; as it is a maxim, that every man shall be presumed innocent of an offence, till he be found guilty. But where an action is brought on a *remedial* statute, as for money won at play<sup>2</sup>; or on a statute which expressly authorizes an arrest, as for exporting wool<sup>3</sup>, double rent<sup>4</sup>, having unsealed wrought silks<sup>5</sup>, or insuring lottery tickets<sup>6</sup>, &c. the defendant may be arrested.

In an action of debt upon a *recognizance* of bail, or upon a<sup>7</sup> *bail or replevin*<sup>8</sup> bond, the defendants cannot be arrested; for by taking the bail, or assignment of the bond, they are admitted to be sufficient: and besides, if an arrest were allowed in such actions, there would be bail *in infinitum*.

In an action of debt upon bond, conditioned for the *payment of money*, the penalty is, strictly speaking, the legal debt; but yet, as it is now

<sup>1</sup> Gilb. C. P. 37.

<sup>2</sup> 26 G. II. c. 21. 3. Bur.

<sup>3</sup> 9 Ann. c. 14. 2 Str.

1569.

1079. but see 2 Will. 67.

<sup>4</sup> 27 G. III. c. 1. and see

<sup>5</sup> 10, 11 W. III. c. 10. §

1 T. R. 705. 2 T. R. 654.

20. Com. Rep. 75.

as to the form of the affidavit.

<sup>6</sup> 4 G. II. c. 28.

<sup>7</sup> R. M. 8 Ann. (c.)

<sup>8</sup> 1 Salk. 99.

considered,

considered, upon the statute for the amendment of the law<sup>y</sup>, to be merely a security for principal interest and costs, the defendant cannot be arrested for more than the sum really due by the condition. And, in like manner, where the bond is conditioned for the *performance of covenants*<sup>z</sup>, or *to save harmless*, &c. the defendant ought not to be arrested for the penalty, but only for the amount of the damages, really sustained by the breach of the condition. He may be arrested, however, for the penalty of a bond conditioned for the performance of *a promise of marriage*<sup>a</sup>, &c. where the penalty is the real debt, or rather in nature of stated damages.

Where there have been *mutual* dealings between the parties, the *balance* is considered as the debt at law as well as in equity: and, therefore, upon an unliquidated account, if the plaintiff were to swear to the sum due to him, on the debtor side only, it would be looked upon as a mere evasion; and if not ground enough to support an indictment for

<sup>y</sup> 4, 5 Ann. c. 16. § 13. Doug. 432.

<sup>z</sup> 1 Sid. 63. 1 Salk. 100.    <sup>a</sup> 1 Will. 59. 3 Bur. 1351, Barnes, 109. Say. Rep. 109. 1373. Doug. 432.



perjury, would at least entitle the defendant to an action upon the case, for a malicious arrest <sup>b</sup>.

The defendant, having been once arrested, cannot be arrested again for the same cause of action. *Nemo debet bis vexari pro eadem causa*. Thus, where the defendant was arrested on a writ, taken out pending a prior action, wherein he had been previously arrested, for the same cause, the court discharged him on common bail <sup>c</sup>. But where, in a similar case, it appeared that the bail in the prior action were forsworn, the court refused to assist the defendant; saying, the plaintiff was right in laying hold of him as he did, for had he discontinued, the defendant would probably have run away <sup>d</sup>.

This rule, of not permitting the defendant to be twice arrested for the same cause, was formerly so rigidly adhered to, that where the plaintiff was *nonpros'd* for want of a declaration, he could not afterwards have arrested the defendant, in a second action <sup>e</sup>. But a different doctrine now prevails; <sup>f</sup> for the plaintiff is said to suffer enough by paying costs in the

<sup>b</sup> Dr. Turlington's case, 4 Bur. 1996.

<sup>c</sup> 2 Str. 1209.

<sup>d</sup> 2 Str. 1216.

<sup>e</sup> 1 Ld. Raym. 679. Com. Rep. 94. S. C.

<sup>f</sup> 1 Str. 439.

first action, and therefore ought not to be in a worse condition than before. For a similar reason, where the plaintiff, having misconceived his action, moves to discontinue upon payment of costs, he may, after the costs are taxed and paid, <sup>g</sup> take out a new writ for the same cause, and have the defendant arrested *de novo*<sup>h</sup>. But where the plaintiff, not liking the bail in the former action, obtained a side bar rule for leave to discontinue, upon payment of costs, and afterwards proceeded to charge the defendant in custody, with a declaration in a new action, the court, conceiving this to be a trick, discharged the side bar rule; so that the bail to the former action still continued liable<sup>i</sup>. And wherever the second action appears to be *vexatious*<sup>k</sup>, or the defendant is arrested or detained in custody therein, after being *superseded* or *supersedeable* in a former action, by the *laches* of the plaintiff<sup>l</sup>, the court will discharge the defendant on common bail; even though he be arrested, on a note given subsequent to the *supersedeas*<sup>m</sup>.

Upon the same principle, of not permitting the defendant to be twice arrested for the same

<sup>g</sup> 2 Str. 1209.

<sup>h</sup> 2 Wils. 381.

<sup>i</sup> 4 Bur. 2502.

<sup>k</sup> 2 Blac. Rep. 809.

<sup>l</sup> 2 Str. 782, 943, 1039.

<sup>2</sup> Wils. 93. Cowp. 72.

<sup>m</sup> 2 Str. 1218.

cause, it is holden <sup>n</sup>, that in an action of debt upon judgment, whether after verdict or by default, the defendant cannot be arrested, if he was previously arrested in the original action; even though the bail in that action have since become *insolvent* <sup>o</sup>, or the plaintiff has *released* them, by declaring in a different county <sup>p</sup>, or the defendant has *surrendered* in their discharge, and obtained a *superfedeas* <sup>q</sup>. If the defendant were not arrested in the original action, he may be arrested in an action of debt upon the judgment; provided there was originally a bailable debt or cause of action <sup>r</sup>. But where there was originally no debt at all, as where the judgment is merely for *costs*, upon a nonsuit <sup>s</sup>; or the debt was originally under ten pounds, but is raised to a larger sum, by the addition of costs <sup>t</sup>; or the action was for *general* damages, which are reduced by the judgment to a sum *certain* above ten pounds <sup>u</sup>; the defendant cannot be arrested, either upon the judgment itself, or upon a subsequent promise, in

<sup>n</sup> 2 Str. 782. Say. Rep. <sup>r</sup> Pr. Reg. 55, 6.  
 43. Pr. Reg. 55, 6. <sup>s</sup> 5 Bur. 2660. 2 Blac. Rep.  
<sup>o</sup> Say. Rep. 160. 1274. C. B. contra.  
<sup>p</sup> 2 Willf. 93. <sup>t</sup> 2 Str. 975, 1077. 3 Bur.  
<sup>q</sup> 2 Str. 1039. R. H. 8 G. 1389. 4 Bur. 2117. Barnes,  
 II. C. B. but see Cas. pr. 432. *contra*.  
 C. B. 34. <sup>u</sup> 2 Str. 1243. 1 Willf. 120.

consideration

consideration of forbearance<sup>v</sup>, to pay the debt and costs. It may, therefore, be laid down as a general rule, that the defendant can in no case be arrested, in an action of debt upon the judgment, except where he might have been, but was not, arrested in the original action. Yet where a cause in which the defendant has been arrested is referred to *arbitration*; and the arbitrator awards to the plaintiff a sum exceeding ten pounds, the defendant may be arrested again in an action upon the *award*<sup>w</sup>.

The *affidavit* of the cause of action may be made by the plaintiff, his wife, or a third person; and sworn before a commissioner, although he be concerned as attorney for the plaintiff<sup>x</sup>. But it must be made by some person who is legally competent to be a witness; and therefore it is bad, if made by a person convicted of felony, or other infamous crimes<sup>y</sup>; nor will an affidavit made abroad be received here<sup>z</sup>. In each action, there must be a separate affidavit; as one only will not serve for different actions against one<sup>a</sup>, or several defend-

<sup>v</sup> Cowp. 129.

Barnes, 79. 2 Str. 1148. 3

<sup>w</sup> 2 T. R. 756.

Willf. 225.

<sup>x</sup> R. E. 15 G. II. B. R. 2

<sup>z</sup> 2 Str. 1209. 2 Bur. 655.

Barnes, 37. C. B. *contra*.

<sup>a</sup> 5 Bur. 2690.

<sup>y</sup> 5 Mod. 74. 2 Salk. 261.



dants<sup>b</sup>. In point of form, the affidavit should be *certain and explicit*: therefore an affidavit, that the defendant is indebted to the plaintiff in such a sum, *upon promises*<sup>c</sup>, or in so much upon a bond for *performance of covenants*<sup>d</sup>, or upon *breach of articles*<sup>e</sup>, has been holden to be too general. It is also indispensably necessary, that the affidavit should be *direct and positive*, that the plaintiff has a *subsisting* cause of action; and, therefore, if it be merely by way of *reference* to books or accounts, &c. or as the party making it *believes*, it will not be sufficient<sup>f</sup>. But an affidavit, that the defendant is indebted to the plaintiff in such a sum, *as he computes it*, has been adjudged good<sup>g</sup>. Where the plaintiff sues as *executor or administrator*<sup>h</sup>, or as *assignee of a bankrupt*<sup>i</sup>, it is sufficient for him to swear, that the defendant is indebted, &c. *as appears by books, &c. and as he verily believes*: but even in that case, a mere *reference* to books, &c. unsupported by the party's be-

<sup>b</sup> Doug. 207.

<sup>c</sup> *Id.* 450.

<sup>d</sup> Say. Rep. 109.

<sup>e</sup> *Booker v. Friend*, cited

in Say. Rep. 109.

<sup>f</sup> 2 Str. 1157, 1209, 1219,

1226, 1270. 1 Will. 121,

231, 279, 339. Say. Rep.

59. S. C. 2 Bur. 655. 3

Bur. 1447, 1687. 4 Bur.

2126. 1 T. R. 716. 2 T.

R. 55. 3 T. R. 575.

<sup>g</sup> 2 Bur. 1032.

<sup>h</sup> 4 Bur. 1992, 2283. 1

T. R. 83.

<sup>i</sup> Same Cases.

*lief,*

*lief*, is not sufficiently positive <sup>k</sup>. The *assignee of a bond* swore, that the obligor was indebted in ninety pounds, for principal and interest upon the bond, *as he believed*, and it was deemed sufficient, to hold the defendant to special bail<sup>l</sup>: But it is usual, in such case, for the obligee and assignee to join in swearing to the execution of the bond, the assignment of it, and how much is due for principal and interest. If there be *no* affidavit, or if the affidavit be defective, or not duly filed <sup>m</sup>, or if the sum sworn to be not indorsed on the writ <sup>n</sup>, the court will discharge the defendant upon common bail.

Where there is a good cause of action, and a proper affidavit, the defendant may, in general, be arrested; and the court will not go out of the affidavit, or prejudge the cause, by entering into the merits upon which it is founded<sup>o</sup>. The plaintiff, therefore, must stand or fall by his affidavit; it being the constant and uniform practice of this court, in cases of arrest, not to receive a *supplemental or explanatory* affidavit on the part of the plaintiff, nor

<sup>k</sup> 2 Str. 1219. 1 T. R. 83. cited in 2 Wils. 225.

<sup>l</sup> 1 Wils. 232.

<sup>n</sup> 1 Bur. 332.

<sup>m</sup> *Hussey v. Baskerville*,

• 1 Salk. 100.

a *counter or contradictory* one on the part of the defendant <sup>p</sup>. Even an affidavit of the plaintiff's confession, that the defendant owes him nothing, will not be received <sup>q</sup>.

There are many cases, however, in which the defendant is *privileged* from arrest; and that either *personally*, or by reason of the *time* and *place*, when and where he is found <sup>r</sup>. Thus, in the first place, not to mention the *royal family* <sup>s</sup>, it is holden that the *servants in ordinary* of the king or queen *regent*, ought not to be arrested, without notice first given to, and leave obtained from the lord chamberlain of his majesty's household <sup>t</sup>. But the servants of the queen *consort* or *dowager* have no such privilege <sup>u</sup>.

II. By the law of nations, as *declared* by the statute, 7 Ann. c. 12. *Ambassadors, and other publick ministers* <sup>v</sup>, are privileged from arrest; as are also their *domestic servants*. But it has

<sup>p</sup> 2 Str. 1157. 1 Wils. 335. <sup>r</sup> 2 Salk. tit. *Privilege*.  
 Say. Rep. 53. S. C. 2 Wils. <sup>s</sup> 2 Inst. 50.  
 225. 1 Blac. Rep. 192. 1 <sup>t</sup> T. Raym. 152. 2 Keb.  
 Bur. 655. 4 Bur. 2017. 3, 485.  
 Doug. 432, 450. 1 T. R. <sup>u</sup> 1 Keb. 842, 877.  
 716. <sup>v</sup> Cas. temp. Talb. 281. 4  
<sup>q</sup> 1 Wils. 335. Bur. 2016.

been

been adjudged<sup>w</sup>, that a defendant, claiming the benefit of this act, as domestic servant to a publick minister, must be really and *bonâ fide* his servant, at the time of the arrest; and must clearly shew by affidavit, the general nature of his service, the actual performance of it, and that he was not a trader or object of the bankrupt laws<sup>x</sup>. For, by the law of nations, a publick minister cannot protect a person who is not *bonâ fide* his servant. It is the law that gives the protection; and though the process of the law shall not take a *bonâ fide* servant out of the service of a publick minister, yet, on the other hand, a publick minister shall not take a person, who is not *bonâ fide* his servant, out of the custody of the law, or screen him from the payment of his just debts<sup>y</sup>. This privilege, however, has been long settled to extend to the servants of a publick minister, being *natives* of the country where he resides, as well as to his *foreign* servants<sup>z</sup>; and not only to servants lying *in* his house, for many houses are not large enough to contain and lodge all the servants of some publick ministers, but also to real

<sup>w</sup> 2 Str. 797. 2 Ld. Raym. 3 Bur. 1676, 1731. 3 Wils. 1524. Fitzgib. 200. S. C. 33.

1 Wils. 20, 78. 1 Blac. Rep. <sup>x</sup> See the statute, § 5.

48. 1 Bur. 401. 3 Bur. <sup>y</sup> 4 Bur. 2016, 17.

1478. 1 Blac. Rep. 471. S. C. <sup>z</sup> 3 Bur. 1676.

and



and actual servants lying out of his house<sup>a</sup>: Nor is it necessary, to entitle them to the privilege, that their names should have been registered in the secretary of state's office, and transmitted to the sheriff's office<sup>b</sup>; though, unless they have been so registered and transmitted, the sheriff or his officers cannot be proceeded against for arresting them<sup>c</sup>. And it is not to be expected, that every particular act of the service should be specified. 'Tis enough if an actual *bonâ fide* service be proved: And if such a service be sufficiently made out by affidavit, the court will not, upon bare suspicion, suppose it to have been merely colourable and collusive<sup>d</sup>.

III. By the common law, *peers of the realm of England*<sup>e</sup>, and *peeresses*, whether by birth or marriage<sup>f</sup>, are constantly privileged from arrest in civil suits, on account of their dignity, and because they are supposed to have sufficient property, by which they may be compelled to appear; which privilege is extended, by the act of union<sup>g</sup>, to *peers and peeresses of*

<sup>a</sup> 2 Str. 797. 3 Will. 35. 2 Salk. 512.

<sup>b</sup> 4 Bur. 2017. 3 T. R. 79. <sup>f</sup> 6 Co. 52. Sty. Rep. 252.

<sup>c</sup> See the statute, s. 5. 1 Vent. 298. 2 Chan. Caf. 224.

<sup>d</sup> 4 Bur. 1481.

<sup>g</sup> 5 Ann. c. 8. art. 23. and

<sup>e</sup> 6 Co. 52. Sty. Rep. 222. see Fort. 165. 2 Str. 990.

*Scotland.*

*Scotland.* But this privilege will not exempt them from *attachments*, for not obeying the process of the court <sup>h</sup>; nor does it extend to *Irish* or other *foreign* peers <sup>i</sup>, or to peerefes by marriage, if they afterwards intermarry with commoners <sup>k</sup>. And though the *servants of peers*, necessarily employed about their persons and estates, could not formerly be arrested <sup>l</sup>, yet this privilege seems to have been taken away by a late statute <sup>m</sup>.

IV. By the law and custom of parliament, *members of the house of commons* <sup>n</sup> are privileged from arrest, not only during the actual sitting of parliament, but for a convenient time, sufficient to enable them to come from, and return to, any part of the kingdom, before the first meeting, and after the final dissolution of it; and also for forty days <sup>o</sup> after every prorogation, and before the next appointed meeting; which is now in effect as long as the parlia-

<sup>h</sup> 1 Willf. 332. Say. Rep. 50. 1065. 1 Willf. 278.

S. C. 1 Bur. 631.

<sup>m</sup> 10 G. III. c. 50.

<sup>i</sup> 2 Inst. 48. 3 Inst. 30. 7 Co. 15; 16.

<sup>n</sup> Same statute. 2 Str. 985. Fort. 159. Com. Rep.

<sup>k</sup> Co. Lit. 16. 2 Inst. 50. 444. S. C.

<sup>l</sup> 4 Co. 118. Dy. 79.

<sup>o</sup> 2 Lev. 72. 1 Chan. Caf.

<sup>1</sup> *Ordo dom. proc.* 28<sup>o</sup>

221. S. C; but see 1 Sid. 29. *Junii*, 1715. 1 Mod. 146. 2 Str.

ment exists, it being seldom prorogued for more than fourscore days at a time <sup>p</sup>.

V. *Members of convocation* and their *servants* have, by statutes <sup>q</sup>, the same privilege from arrest in coming, tarrying, and returning, as peers and members of the house of commons.

VI. *Members of corporations aggregate* <sup>r</sup>, and *hundredors* <sup>s</sup>, not being liable to a *capias*, cannot be arrested for any thing done in their corporate capacity, or on the statutes of hue and cry, &c.

VII. *Bankrupts*, who are not previously in custody, are exempted from the arrest of their creditors, in coming to surrender, and from their actual surrender for two and forty days, or such further time as shall be allowed for finishing their examination <sup>t</sup>. But this is a *particular* privilege, to enable them to surrender, and till their actual surrender is confined to the act of going with that view; not a *general* privilege, during the whole time which the act of parliament allows them for that purpose <sup>u</sup>. And they may be taken, in order to be surrendered by their *bail*, at any time; even during

<sup>p</sup> 1 Blac. Com. 165.

<sup>q</sup> 3 Keb. 126, 7.

<sup>r</sup> 8 Hen. VI. c. 1. 1

<sup>t</sup> Stat. 5 G. II. c. 30.

Eq. Caf. Abr. 349.

f. 5.

<sup>s</sup> Bro. tit. *Corporation*,

<sup>u</sup> Cowp. 156.

their examination before the commissioners<sup>v</sup>. Bankrupts, having obtained their certificates, are not liable to be arrested, for debts contracted prior to their bankruptcy<sup>w</sup>; nor for the *costs* of suing for such debts, or any *interest* thereon pending the commission<sup>x</sup>; but where a bankrupt, sued as executor, pleaded a false plea, between the issuing of the commission, and the obtaining of his certificate, he was holden to be liable to costs for such plea, *de bonis propriis*<sup>y</sup>. If a bankrupt, having obtained his certificate, conscientiously promise to pay a debt, contracted prior to his bankruptcy, he cannot be arrested thereon<sup>z</sup>; for that would be taking advantage of his conscientiousness, to use it against conscience. But where the commission<sup>a</sup>, or certificate<sup>b</sup>, appears to be fraudulent, or the debt arises after the bankruptcy, as upon a recognizance in error<sup>c</sup>, or bail bond<sup>d</sup>, which was not then forfeited, the bankrupt may be arrested, notwithstanding his certificate. Where the

<sup>v</sup> 1 Atk. 238.

<sup>w</sup> Stat. 5 G. II. c. 30.

f. 7. 13. 2 Str. 949.

<sup>x</sup> 2 Str. 1196. 1 Willf.

41. S. C. Cowp. 138. but

see 1 Str. 477, 8.

<sup>y</sup> 3 Bur. 1368. 1 Blac.

Rep. 400. S. C.

<sup>z</sup> 2 Bur. 736. Cowp.

549. S. C. cited.

<sup>a</sup> 2 Blac. Rep. 725. Cowp.

824.

<sup>b</sup> Doug. 216.

<sup>c</sup> 2 Str. 1043.

<sup>d</sup> 1 Bur. 436.

defendant



defendant is intitled to the benefit of his certificate, he is discharged by the statute two ways; first, by pleading his certificate, if in time; and secondly, by applying to a judge, upon an affidavit of the certificate<sup>e</sup>, when it is obtained after judgment<sup>f</sup>.

VIII. *Insolvent debtors and fugitives*, discharged under insolvent acts<sup>g</sup>, are not liable to be arrested, even on *subsequent* promises<sup>h</sup>, for debts contracted *prior* to the times prescribed by the acts; but they may be arrested for debts contracted afterwards, and before they were actually discharged<sup>i</sup>. The sheriff, however, is not bound to take notice of their privilege<sup>k</sup>: Nor do the clauses respecting fugitives extend to persons who have constantly resided abroad<sup>l</sup>; or who have been abroad, merely in the course of their trade, and not for the purpose of avoiding their creditors<sup>m</sup>.

IX. *Executors and administrators* cannot be arrested, where they are merely so chargeable, and have duly administered the effects of the deceased<sup>n</sup>. But where an executor or administrator hath personally promised to pay a

<sup>e</sup> Doug. 651.

<sup>f</sup> 1 Willf. 41.

<sup>g</sup> See the statute 18 G.

III. c. 52. f. 37.

<sup>h</sup> 2 Str. 1233.

<sup>i</sup> Cowp. 527.

<sup>k</sup> Doug. 646.

<sup>l</sup> 1 Willf. 85.

<sup>m</sup> Say. Rep. 308.

<sup>n</sup> R. M. 15 Car. II.  
*reg. 2.*

debt or legacy °, he may be arrested on such promise. So he may be arrested in an action of debt on judgment, suggesting a *devastavit* °; if it appear by affidavit, or the sheriff's return °, that he has *wasted* the effects of his testator or intestate.

X. In an action against *husband and wife*, the husband alone is liable to be arrested; and shall not be discharged, until he have put in bail for himself and his wife °. If the wife be arrested by *mesne* process, she shall be discharged on common bail; and that, whether she be arrested singly °, or jointly with her husband °. So in an action against the wife only, if it be clear and notorious that she is covert, and has no separate maintenance, common bail ought to be received °; but if her coverture be doubtful, or the plaintiff has trusted her as a feme sole °, she must find special bail. And

° 1 T. R. 716.

° 1 Lev. 216. 1 Salk.

° 1 Sid. 63. 1 Lev. 115. 6 Mod. 17. 2 Str. 39. Carth. 264. 1 Mod. 1272. 1 T. R. 486. K. 16. 1 Salk. 98. Highmore B. Barnes, 96. 3 Wils. on bail, 10. 124. 2 Blac. Rep. 720.

° Comb. 206, 325.

S. C. C. B.

° 1 Ventr. 49. 1 Mod. 8. ° 6 Mod. 105. 7 Mod. S. C. 6 Mod. 17, 86. R. 10. E. 5. G. II. 1. (b.) ° *Wilson against Campbell*,

° Cro. Jac. 445. Pr. Reg. M. 20 G. III. 65, 6.

where the wife is taken in *execution*, she shall not be discharged; unless it appear, that there is fraud and collusion, between the plaintiff and her husband, to keep her in prison<sup>w</sup>.

XI. *Attornies and other officers*, on account of the supposed necessity of their attendance, in order to transact the business of the court, are, generally speaking, privileged from arrest<sup>x</sup>. But the sheriff cannot take notice of their privilege<sup>y</sup>; nor is he bound to discharge them, even upon producing their writs of privilege, except where the arrest was by process issuing out of an *inferior* court, in which case their writs of privilege ought to be allowed *instanter*<sup>z</sup>. If an attorney or other officer of the king's bench be arrested, by process issuing out of the *same* court, he may move to be discharged on common bail<sup>a</sup>. But an attorney or officer of a *different* court must find special bail, and plead his privilege in abatement<sup>b</sup>.

## XII.

<sup>w</sup> 2 Str. 1167, 1237. 1 Blac. Rep. 1087.  
 Willf. 149. K. B. Barnes, <sup>a</sup> 1 Mod. 10. 2 Salk.  
 203. 3 Willf. 124. 2 Blac. 544. 1 Willf. 298.  
 Rep. 720. S. C. C. B. <sup>b</sup> 2 Salk 544. 2 Str. 864.  
<sup>x</sup> 1 Mod. 10. But *vide* 2 Ld. Raym. 1567. S. C. 1  
*post*, ch. v. Willf. 306. And *note*, there are  
<sup>y</sup> Co. Lit. 131. 1 Salk. twoways of pleading an attor-  
 1. And see Doug. 646. ney's privilege, first, with a  
<sup>z</sup> Cas. pr. C. B. 2. 2 *profer* of a writ of privilege,  
 or



XII. The *parties* to a suit, and their *witnesses*, are, for the sake of publick justice, protected from arrest, in coming to, attending upon, and returning from, the court; or, as it is usually termed, *eundo, morando, et redeundo*<sup>c</sup>. Nor have the courts been nice in scanning this privilege, but have given it a large and liberal construction. Thus, where the defendant was attending his cause at the sittings, and though it was put off early in the day, stayed in court till five in the afternoon, and then went with his attorney and witnesses to dine at a tavern, where he was arrested during dinner; the court held, that such a necessary refreshment as this, ought not to be looked upon as a deviation, so as to cancel the defendant's privilege *redeundo*<sup>d</sup>. So where a witness, having attended a trial at Winchester assizes, which was over on Friday about four in the afternoon, was arrested on Saturday about seven in the even-

or exemplification of the record of his admission, upon which, as it cannot be denied, no issue can be taken; secondly, as a mere matter of fact, without a *profert*, Lil. Ent. 3. and then a *certiorari* shall be awarded, to certify whether he be an at-

torney or not. 1 Ld. Raym. 336. 7 Mod. 106. 2 Salk. 545. 6 Mod. 305. 2 Ld. Raym. 1172. 1 Str. 76, 532. • 2 Rol. Abr. 272. 2 Lil. P. R. 369. 1 Mod. 66. S. C. 1 Ventr. 11. Gilb. C. P. 207, &c. <sup>d</sup> 2 Blac. Rep. 1113.



ing, as she was going home in a coach to Portsmouth, the court held that she ought to be discharged, her protection not being expired; and that a little deviation or loitering would not alter it <sup>e</sup>. There is, indeed, a case in the year books <sup>f</sup>, where a man was arrested in a town, which was forty miles out of his way, and yet was allowed his privilege; for perhaps, it is said, he went there to buy a horse, or other necessaries for his journey.

XIII. *Clergymen*, going to and returning from church, or performing divine service therein, are privileged, by statute <sup>g</sup>, from arrest; but not if they stay in church, with a fraudulent design of eluding the process of the law <sup>h</sup>.

XIV. Every man is privileged, by the common law, from arrest in his own house, provided the outer door be shut <sup>i</sup>; or in the king's presence <sup>k</sup>; or within the verge of his royal palace <sup>l</sup>, except where the process issues

<sup>e</sup> Gilb. Caf. K. B. 308. 1. 63.

<sup>2</sup> Str. 986. S. C. cited.

<sup>k</sup> 3 Blac. Com. 289.

<sup>f</sup> Bro. tit. *Privilege*, 4.

<sup>1</sup> Stat. 28 Hen. VIII. c.

<sup>g</sup> 50 Ed. III. c. 5. 1 R. II.

12. 2 Ld. Raym. 978. 3

c. 16. 5 Bac. Abr. 165.

Salk. 91, 284. 6 Mod. 73.

<sup>h</sup> 3 Blac. Com. 289.

Holt, 590. S. C.

<sup>i</sup> 5 Co. 91. But see Cowp.

out of the palace court <sup>m</sup>; or in any place where the king's justices are actually sitting <sup>n</sup>.

*Lastly*, by statute <sup>o</sup>, no arrest can be made, or process served, on a *Sunday*; except for treason, felony, or breach of the peace. In construing this statute, it has been holden, that one who is convicted on a *penal* act, cannot be arrested on a Sunday, for non payment of the forfeiture <sup>p</sup>. But a prisoner, who has *escaped*, may be re-taken on a Sunday; and that, either by the officer upon fresh pursuit, or by virtue of an escape warrant <sup>q</sup>; for this is not an original process, but the party is still in custody upon the old commitment. Also it is holden, that *bail* may take their principal on a Sunday, in order to surrender him <sup>r</sup>; for this is not by virtue of any process at all. And it should seem, that process of contempt, being of a *criminal* nature, may be served upon a Sunday <sup>s</sup>.

In some of the preceding cases, the process is declared to be void; as against ambassadors,

<sup>m</sup> *Per cur.* T. 30. G. III.

<sup>q</sup> 2 *Ld. Raym.* 1028. 2

<sup>n</sup> 3 *Inst.* 140, 141. 1 *Sid.* *Salk.* 626. 6 *Mod.* 95. *S. C.* 211. 1 *Lev.* 106. *S. C.* <sup>r</sup> 6 *Mod.* 231. 1 *Atk.* 2 *Mod.* 181. 239.

<sup>o</sup> 29 *Car. II. c. 7. § 6.* <sup>s</sup> 12 *Mod.* 348. 1 *Atk.* 1 *Salk.* 78. 55.

<sup>p</sup> 1 *T. R.* 265.

peers<sup>t</sup>, &c. In others, the court is expressly required to discharge the defendant<sup>u</sup>. And it may be remarked, in general, that where the defendant is entitled to privilege, as the arrest is irregular and unlawful, the court will discharge him upon motion, and not put him to the necessity of suing out a writ of privilege<sup>v</sup>.

<sup>t</sup> *Ante*. 20.

<sup>v</sup> 2 Str. 989. Fort. 159.

<sup>u</sup> Stat. 1 G. II. c. 14. Com. Rep. 444. S. C. But f. 15. 5 G. II. c. 30. f. 7. see 1 Wils. 278.  
13.

## C H A P. IV.

## Of Outlawry.

WHERE the defendant is abroad, or keeps out of the way, so that he cannot be arrested or served with process, the plaintiff, on the return of *non est inventus* to the *pluries capias*, may have a writ of *exigi facias*, and proceed to *outlawry*<sup>a</sup>: or if there be several defendants in a joint action, and one of them be abroad, or keep out of the way, the plaintiff may have a writ of *exigi facias* against that defendant<sup>b</sup>; and must proceed to outlawry against him, before he can go on against the others<sup>c</sup>.

*Outlawry*, in civil actions, is putting a man out of the protection of the law, so that he is not only incapable of suing for the redress of injuries, but may be imprisoned, and forfeits all his goods and chattels, and the profits of his lands; his *personal* chattels *immediately* upon the outlawry, and his chattels *real*, and the profits of his lands, when found by inquisition<sup>d</sup>.

<sup>a</sup> 3 Blac. Com. 283. Gilb. 2 Str. 1269. 1 Blac. Rep. 20. C. P. 15. S. C.

<sup>b</sup> Trye, 155.

<sup>d</sup> 1 Salk. 395.

<sup>c</sup> 1 Str. 473. 1 Wilf. 78.



So penal were the consequences of an outlawry, that until some time after the conquest, no man could have been outlawed except for felony, the punishment whereof was death: But in Bracton's time<sup>e</sup>, and somewhat earlier, process of outlawry was ordained to lie in all actions *vi et armis*; and since, by a variety of statutes, (the same as introduced the *capias*), process of outlawry lies in *account*, *debt*, *detinue*, and divers other common or civil actions<sup>f</sup>.

If the defendant be a woman, the proceeding is called a *waiver*; for as women were not sworn to the law, by taking the oath of allegiance in the leet, (as men anciently were, when of the age of twelve years or upwards), they could not properly be *outlawed*, or put out of the law, but were said to be *waived*, that is, *derelictæ*, left out, or not regarded<sup>g</sup>. And for the same reason, an *infant* cannot be outlawed, under the age of *twelve* years<sup>h</sup>.

Outlawry is either upon *mesne* process before, or upon *final* process after judgment<sup>i</sup>. Upon *mesne* process, the plaintiff cannot proceed to outlawry, unless the action be commenced by *original* writ<sup>k</sup>; nor can the de-

<sup>e</sup> Bract. *lib.* v. p. 425.

b. Trye, 66.

<sup>f</sup> Co. Lit. 128. b. Trye,

<sup>h</sup> Co. Lit. 128. a.

72. Gilb. C. P. 15. Fort. 37.

<sup>i</sup> Trye, 77.

<sup>g</sup> Lit. § 186. Co. Lit. 122.

<sup>k</sup> 1 Sid. 159.

fendant

defendant be outlawed after judgment, unless the action were so commenced : therefore, where the defendant was outlawed after judgment, in an action commenced by *bill* of privilege, it was holden that process of outlawry did not lie, as there was no *capias* in the original action<sup>1</sup>. After judgment, the plaintiff may have an *exigi facias*, and proceed to outlawry, upon a *capias ad satisfaciendum*, without an *alias* or *pluries*<sup>m</sup>; because the defendant, having been already in court before judgment, and having conusance of the debt, ought to pay it on the first suing out of the *capias*, and his not performing the judgment is a contumacy, for which he is put out of the king's protection. And no writ of *proclamation* is required upon an *exigent* after judgment, but only upon mesne process<sup>n</sup>.

The writ of *exigi facias* is a judicial writ, made out by the *filacer*, as clerk of the *exigents*<sup>o</sup>, and directed to the sheriff of the county where the action is laid<sup>p</sup>, commanding him to cause the defendant to be *required* from county court to county court, or from *husting* to *husting*, if

<sup>1</sup> 1 Leon. 329.

<sup>m</sup> Gilb. C. P. 17. Trye, 77, 124.

<sup>n</sup> Cro. Jac. 577.

<sup>o</sup> Trye, *in pref.*

<sup>p</sup> Fitz. Abr. tit. *Exigent*,

26. Bro. Abr. tit. *Exigent* & *Capias*, 19. Dyer, 295. But see 3 Bac. Abr. 769. Gilb. C. P. 15. Cromp. introd. 100. *semb. contra.*

in *London*<sup>a</sup>, that is, at five *successive*<sup>r</sup> county courts or hustings, until he be outlawed, if he do not appear, and if he appear, to take him<sup>s</sup>, &c. This writ should be tested on the *quarto die post* of the return of the *pluries capias* before, or of the *capias* after judgment; and if there be not five county courts between the teste and return of it, there issues an exigent *de novo*, grounded upon the sheriff's return to the former writ, with a clause (from whence it is called an *allocatur* exigent), directing the sheriff to *allow* the several county courts, at which the defendant has been already required<sup>t</sup>.

In addition to the exigent, a writ of *proclamation*<sup>u</sup> was introduced by the statute 6 Hen. VIII. c. 4. which requires it to be directed to the sheriff of the county of which the defendant is called, or described in the original; for there he was supposed to dwell; and if he did not in fact dwell there, he might have avoided the outlawry, by the statute of additions<sup>v</sup>. But the writ of proclamation is at present go-

<sup>a</sup> In *London* the hustings are holden once every fortnight; on which account the action is generally laid there, when the plaintiff intends to proceed to outlawry. Trye, 66. 3 Lev. 245.

<sup>r</sup> Plowd. 371.

<sup>s</sup> Trye, 112.

<sup>t</sup> *Id.* 114. Rast. Ent. 189, 355.

<sup>u</sup> Gilb. C. P. 19. Trye, 113. *Thef. brev.* 88.

<sup>v</sup> Dyer, 214.

### Of Outlawry.

verned by the statute 31 *Eliz.* c. 3. § 1. which enacts, that “ in every action personal, where-  
“ in any writ of *exigent* shall be awarded out  
“ of any court, a writ of *proclamation* shall be  
“ awarded and made out of the same court,  
“ having day of teste and return as the said  
“ writ of *exigent* shall have, directed and deli-  
“ vered of record to the sheriff of the county  
“ where the defendant at the time of the exi-  
“ gent so awarded shall be dwelling; which  
“ writ of proclamation shall contain the effect  
“ of the same action: and that the sheriff of  
“ the county, unto whom any such writ of  
“ proclamation shall be delivered, shall make  
“ three proclamations, *one* in the open coun-  
“ ty court, *another* at the general quarter  
“ sessions of the peace, in those parts where  
“ the defendant at the time of the exigent  
“ awarded shall be dwelling, and the *third*,  
“ one month at the least before the *quinto ex-*  
“ *actus* by virtue of the said writ of *exigent*, at  
“ or near the most usual door of the church  
“ or chapel of that town or parish where the  
“ defendant shall be so dwelling; and if the  
“ defendant shall be dwelling *out* of any  
“ parish, then in such place as aforesaid of the  
“ next adjoining parish in the same county,  
“ and upon a Sunday, immediately after di-  
“ vine service, and sermon (if there be one),  
“ and



“ and if there be no sermon, then forthwith  
 “ after divine service: and that all outlawries  
 “ had and pronounced, whereupon no writs  
 “ of proclamations shall be awarded and re-  
 “ turned according to the form of this sta-  
 “ tute, shall be utterly void and of none ef-  
 “ fect.”

Upon the defendant's being put in *exigent*, he is either taken by the sheriff, appears voluntarily, or makes default. If he be taken, he either remains in custody of the sheriff, or gives bail, &c. as upon a common arrest. Formerly, if the defendant had appeared voluntarily, at any time before the return of the *exigent*, he might have obtained a writ of *superfedeas* from the *filacer*, as clerk of the *superfedeas's* <sup>w</sup>, on entering a *common* appearance of the term in which the *exigent* issued<sup>x</sup>; and he may still do so, where the action does not require *special* bail. But upon a question agitated some years ago, whether in a case originally requiring *special* bail, if the defendant stand out to an *exigent*<sup>y</sup>, he can come in and appear to the *exigent*, without putting in spe-

<sup>w</sup> Trye, in *pref.*

<sup>x</sup> *Id.* 67, 8. Gilb. C. P. 19. Fort. 39. For the form of the writ, see Trye, 114.

<sup>y</sup> The question, as stated by Sir James Burrow, was, whether the defendant, stand-

ing out to an *outlawry*, can come in and appear to the *outlawry*, without putting in special bail: But upon inquiry, it appears to have been, as stated above, upon the *exigent*, before *outlawry*.

cial bail; it was ruled by the court, that there ought to be special bail. "It would be very unreasonable," they said, "that the defendant should gain an advantage, by standing out till process of outlawry: He certainly ought not to be in a better condition then, than if he had appeared at first." And accordingly the direction given was, that the filacer should not issue a *superfedeas*, till the defendant had put in special bail<sup>z</sup>.

If the defendant be neither arrested nor appear, but make default, at five successive county courts, or hustings, he is *outlawed* if a man, or if a woman she is *waived*, by the judgment of the *coroners*, or of the *recorder* in *London*<sup>a</sup>: and the judgment of outlawry being returned by the sheriff upon the *exigent*, the *filacer*, as clerk of the outlawries<sup>b</sup>, will make out a writ of *capias utlagatum*, which is either *general* or *special*<sup>c</sup>, and may be issued into any county, without a *testatum*<sup>d</sup>; nor is there any occasion, upon an outlawry *after* judgment, to revive the judgment by *scire facias*, after a year and a day<sup>e</sup>.

<sup>z</sup> 3 Bur. 1920.

<sup>d</sup> 1 Ventr. 33. Gilb. C. P.

<sup>a</sup> Co. Lit. 288. b. Gilb. 17.

C. P. 15, 16.

<sup>c</sup> Cro. El. 706. 5 Mod.

<sup>b</sup> Trye, *in pref.*

<sup>e</sup> 203. Gilb. C. P. 17.

<sup>e</sup> *Id.* 65, 6. Gilb. C. P. 16.

By the *general writ of capias utlagatum*, the sheriff is commanded, “ that he do not omit,  
 “ by reason of any liberty of his county, but  
 “ that he take the defendant, if he be found  
 “ in his bailiwick, and him safely keep, so  
 “ that he may have his body in court, on a  
 “ *general return day, wheresoever, &c. to do*  
 “ *and receive what the court shall consider of*  
 “ *him* <sup>f</sup>.” The defendant being taken by the sheriff on this writ, either gives bail to appear and reverse the outlawry, or remains in custody, until he actually reverse it, or obtain a charter of pardon, or be relieved under an insolvent act <sup>g</sup>.

At common law, the defendant could not have been bailed, when taken by the sheriff, on a *capias utlagatum* <sup>h</sup>: and this case is particularly excepted out of the statutes 23 Hen. VI. c. 9. and 13 Car. II. stat. 2. c. 2. § 4. ; by the latter of which statutes, it is expressly declared, that “ no sheriff, &c. shall  
 “ discharge any person or persons, taken upon  
 “ any writ of *capias utlagatum*, out of custody,  
 “ without a lawful *superfedeas* first had and received for the same.” But now by statute 4, 5 W. & M. c. 18. § 4, 5. “ If any person  
 “ outlawed in the court of king’s bench, other  
 “ than for treason and felony, shall be taken

<sup>f</sup> Trye, 115.

<sup>g</sup> 4 Bur. 2119, 2127.

<sup>h</sup> Trye, 73. 3 Bur. 1484.

<sup>4</sup> Bur. 2540.

“ and

“ and arrested, upon any *capias utlagatum* out  
“ of the said court, the sheriff making the ar-  
“ rest may, *in all cases where special bail is not*  
“ *required by the said court*, take an attor-  
“ ney’s engagement under his hand, to appear  
“ for the defendant, and reverse the outlawry ;  
“ and may thereupon discharge the defendant  
“ from such arrest : and, *in those cases where*  
“ *special bail is required by the said court*, the  
“ said sheriff shall and may take security of  
“ the defendant, by bond, with one or more  
“ sufficient surety or sureties, in the penalty of  
“ double the sum for which special bail is re-  
“ quired, and no more, for his appearance by  
“ attorney in court, at the return of the writ,  
“ and to do and perform such things as shall  
“ be required by the said court ; and after  
“ such bond taken, may discharge the defend-  
“ ant from the said arrest : Or, in case the de-  
“ fendant shall not be able to give security  
“ as aforesaid, *before the return of the writ*, he  
“ shall and may be discharged, whenever he  
“ shall find sufficient security to the sheriff, for  
“ his appearance by attorney in the said court,  
“ at some return in the ensuing term, to re-  
“ verse the outlawry, and to do and perform  
“ such other thing and things, as shall be re-  
“ quired by the said court.” This statute has  
been construed not to extend to *criminal*  
cases ;



cases; at least, not to misdemeanours, after conviction<sup>i</sup>. And even in *civil* cases, the defendant cannot be bailed, where he was not bailable upon the process to outlawry<sup>k</sup>; for it was the design of the statute to put him in the same condition, as if he had not been outlawed: and therefore, he is not bailable, when taken upon an outlawry *after* judgment<sup>k</sup>. Neither, upon this statute, will the court restore goods, taken upon a special *capias utlagatum*<sup>l</sup>; but they will of course be restored, upon the reversal of the outlawry<sup>m</sup>.

Where there is no affidavit of a bailable cause of action, the sheriff is authorised, by the statute, to discharge the defendant, on an attorney's undertaking to appear and reverse the outlawry. But where an affidavit has been made, he ought not to be discharged, without giving the security required by the statute; which is not a *common* bail bond, but a bond, with one or more sufficient surety or sureties, for appearance by attorney, at the return of the writ, *and to do and perform such things as shall be required by the court*<sup>n</sup>; that is,

<sup>i</sup> 4 Bur. 2539.

<sup>k</sup> *Id.* 2540.

<sup>l</sup> *Per cur.* in 1779, or

1780.

<sup>m</sup> Carth. 459. 1 Ld. Raym.

349. S. C. *Post.*

<sup>n</sup> 3 Bur. 1483.

to put in bail to a new action, plead within a limited time, put the plaintiff in the same condition, and such like matters°. And it is not necessary that the affidavit should be made *before* the outlawry<sup>p</sup>, or the sum sworn to indorsed on the *capias utlagatum*<sup>q</sup>; but it is sufficient, if there be an affidavit before the defendant is discharged: the court having determined, that process of outlawry is not within the statutes for preventing frivolous and vexatious arrests<sup>r</sup>.

By the *special writ* of *capias utlagatum*, the sheriff is commanded not only to take the defendant, as by the *general writ*, but also “ to inquire, by the oath of honest and lawful men of his county, what *goods and chattels*, *lands and tenements*, he hath, or had on the day of his outlawry, or at any time afterwards; and by their oath to *extend* and *appraise* the same, according to their true value; and to *take* them into the king’s hands, and safely keep’ them, so that he may answer to the king for the true *value* and *issues* of the same; making known what he shall do thereupon to the court, on the re-

° 4 Bur. 2540.

<sup>r</sup> *Forbes* against *Allen*, M.

<sup>p</sup> 2 Str. 1178, 9. 1 Will.

10 G. II. cited in 3 Bur.

3. S. C. Fort. 39. S. P.

1483. Barnes, 322.

<sup>q</sup> 3 Bur. 1482.

"turn day". Upon this writ, the sheriff is to impanel a jury, who are to make inquiry of the *goods* and *chattels* of the defendant, including his *debts*, and also of his *leasehold* and *freehold* lands and tenements; to *appraise* the goods, and to *extend* or value the lands, &c. But they are not to inquire of his *copyholds*, or *trust* property. Witnesses may be *subpœna'd* to attend the execution of the inquiry; and when made, the sheriff is to take possession of the goods and chattels of the defendant, and of the *leasehold* tenements in his own occupation\*: But he must not oust or disturb the possession of his tenants<sup>y</sup>; and can only take the *issues* or profits of his *freehold* tenements<sup>z</sup>. The inquisition should set forth, with *convenient certainty*, the appraised value of the *goods*; the particulars of the *debts*; of what *lands*, &c. the defendant is seized or possessed, the different *parcels*, in whose *tenure*, and of what annual *value*, beyond reprises: But the inquisition, being

\* Trye, 115, 16. *Off. Brev.* 41. But see the statute of 35. *Thef. Brev.* 59, &c. *Lil. frauds*, 29 *Car. II. c. 3. f. 10.* Ent. 552.

<sup>y</sup> 4 *Co.* 95. *Lane*, 23. *Lutw.* 329, 1513. *Gilb. C. P.* 200.

<sup>z</sup> *Parker*, 190.

<sup>v</sup> *Cro. Jac.* 513. *Sty. Rep.*

<sup>w</sup> *Impey*, 446.

<sup>x</sup> 9 *Hen. VI.* 20, 21.

<sup>y</sup> *Id.* 21 *Hen. VII.* 7.

<sup>z</sup> *Id.* *Plowd.* 541. *Hardr.* 106, 176. *Bunb.* 103, 105.

merely

merely an office of *instruction* or *information*, does not require so much *certainty* as an office of *entitling*<sup>a</sup>. And if the lands, &c. be *under-valued*, there may be a *melius inquirendum*<sup>b</sup>.

When the *special writ* of *capias utlagatum* is returned, it should be delivered, with the *inquisition* annexed, to the *filacer*, as clerk of the *exigents* and *outlawries*<sup>c</sup>, and afterwards filed in the office of the *custos brevium*<sup>d</sup>; from whence a *transcript* is sent into the *exchequer*<sup>e</sup>. Out of this court there issues a *venditioni exponas* to sell the goods, a *scire facias* to recover the *debts*<sup>f</sup>, and a *levari facias* to levy the *issues* and profits; under which latter writ, the sheriff may take not only the rent and moveables of the party outlawed, but also the cattle of a *stranger*, *levant* and *couchant* on the lands extended<sup>g</sup>. In aid of these writs, a *bill* may be exhibited in the *exchequer* against the outlaw, to compel a discovery of his real and personal estate, &c. either by the plaintiff, to enable him to take out execution, or by the attorney general, on behalf of the crown<sup>h</sup>. And it is said to be the course of that court, upon

<sup>a</sup> 2 Salk. 469. Bunb. 103.

<sup>f</sup> *Id. ibid.* 1 Lutw. 330.

<sup>b</sup> Hardr. 106.

<sup>g</sup> 1 Ld. Raym. 305, and

<sup>c</sup> Trye, *in pref.*

the cases there cited, in the

<sup>d</sup> *Id.* 88, 9. 3 T. R. 578, last edition.

9.

<sup>h</sup> Hardr. 22.

<sup>e</sup> Gilb. C. P. 16.



an outlawry, to prefer an *information*, in the nature of a trover and conversion, against him that hath the goods of the party outlawed <sup>i</sup>.

The money raised by the sheriff, under these writs, belongs to the crown; but the plaintiff may have it paid to him, in satisfaction of his debt and costs, by applying to the court of exchequer, or lords of the treasury: and he may also obtain a *lease* of the lands, &c. under the exchequer seal <sup>k</sup>, or a *grant* of the king's right to levy the profits <sup>l</sup>. If the money raised by the sheriff do not exceed the sum of fifty pounds, the court of exchequer, on *motion*, will order it to be paid to the plaintiff: But if it exceed that sum, the plaintiff must *petition* for it to the lords of the treasury; stating the amount of his debt, a short abstract of the proceedings, with the expences he has been put to, and praying, in respect thereof, that the attorney general may be authorized to consent, on behalf of the crown, that the money, remaining in the sheriff's hands, may be paid over to the petitioner <sup>m</sup>. The petition is *referred*, by the lords of the treasury, to their solicitor; who should be fur-

<sup>i</sup> 1 Mod. 90.

<sup>l</sup> 9 Hen. VI. 20. 2 Rol.

<sup>k</sup> Hardr. 106. 422. T. Abr. 808. Gilb. C. P. 17.

Raym. 17. 1 Lev. 33. S. C.

<sup>m</sup> Impey, 451.

nished with an *affidavit*, sworn before a baron, of the amount of the debt and costs, and a *certificate* of the proceedings from the clerk in court<sup>n</sup>: whereupon he will make his *report*, which should be filed with the clerk of the treasury. A *warrant* is then issued, under the king's sign manual, for the attorney general to give his consent to an order, pursuant to the prayer of the petition; upon which a *motion* is made in the court of exchequer, and the attorney general consenting, an *order* is framed accordingly. This order must be engrossed, and put under seal, with a *subpœna* annexed to perform it; and the sheriff, being served therewith, must pay over the money, or will be liable to an attachment<sup>o</sup>.

Having thus shewn the consequences of an outlawry, I shall proceed to consider the mode of reversing it, where the party outlawed comes in *gratis*, or in consequence of an arrest upon the *capias utlagatum*. There are two ways of reversing an outlawry, 1st, by *writ of error*<sup>p</sup>, returnable *coram nobis*<sup>q</sup>; 2dly, by *motion*, founded on a plea, averment<sup>r</sup>, or suggestion of some matter apparent, as in respect

<sup>n</sup> Impey, 452.

<sup>q</sup> Trye, 74.

<sup>o</sup> *Id.* 448. 2 Crompt. 47.

<sup>r</sup> *Id.* 69, 118. *Thef. Brew.*

<sup>p</sup> Co. Lit. 259. b. Trye, 60.

73. Fort. 38.

of a *superfedeas*, omission of process, variance, or other matter apparent on the record: and yet, in these cases, some have holden, that in another term the defendant is driven to his writ of error. But for any matter of fact, as death, imprisonment, beyond sea at the time of the *exigent* awarded<sup>s</sup>, service of the king, &c. he is driven to his writ of error, unless it be in the case of felony, and there *in favorem vite* he may plead it. It seems, however, to be discretionary in the court to relieve by motion, or put the parties to a writ of error; and of late years they have gone further than heretofore upon motion, the more effectually to expedite justice, save expence, and preserve the credit and character of the defendant.

At common law, the party outlawed must have appeared in *person*, in order to reverse the outlawry; and could not have appeared by *attorney*<sup>t</sup>. But now, by statute 4 and 5 W. and M. c. 18. § 3. *for the more speedy and easy reversing of outlawries, in the court of king's bench*, “ No person outlawed therein, for any  
“ cause, matter, or thing whatsoever, treason  
“ and felony only excepted, shall be compelled  
“ to come or appear in *person* in the said court,  
“ to reverse such outlawry, but shall or may

<sup>s</sup> Carth. 459. 1 Ld. Raym.    <sup>t</sup> Cro. Jac. 462. Trye,  
349. S. C. 2 Str. 1178. 71, 72. 2 Salk. 496.  
1 Will. 3. S. C.

“ appear

" appear by *attorney*, and reverse the same  
 " without bail, in all cases *except where special*  
 " *bail shall be ordered by the said court.*"

Before the allowance of a writ of error, or reversing an outlawry, by plea or otherwise, for want of proclamations, the statute of *Elizabeth*<sup>u</sup> requires, " that the defendant in the original action shall put in bail, not only to appear and answer the plaintiff, in a new action to be commenced for the cause mentioned in the former<sup>v</sup>, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of *two terms* next after allowing the writ of error, or otherwise avoiding the said outlawry." On reversing the outlawry for any other error in law, besides the want of proclamations, it was long unsettled, whether the defendant should be obliged to put in special bail. In the earliest cases upon the subject, it was determined that he should<sup>w</sup>: But there are cases to the contrary, in the time of *Holt*, ch. J.<sup>x</sup>; and in one of them<sup>y</sup> it is said, that if the party outlawed

<sup>u</sup> 31 *Eliz. c. 3. f. 3. 2* bring a new action. *Cro. Salk. 496.* *El. 707.* but see *March, 9.*

<sup>v</sup> The reason seems to be that the process is determined by the outlawry; and consequently the plaintiff cannot declare upon it, but must  
<sup>w</sup> *Lit. Rep. 301. Carth. 459. 1 Ld. Raym. 349 S. C. Gilb. C. P. 19.*

<sup>x</sup> 12 *Mod. 545. 1 Ld. Raym. 605. S. C. 2 Salk. 496.*

<sup>y</sup> 2 *Salk. 496.*



come in *gratis*, upon the return of the *exigent*, &c. he may be admitted by motion to reverse the outlawry, for any other cause but want of proclamations, without putting in bail; but if he come in by *cepi corpus*, he shall not be admitted to reverse it without appearing in person, as in such case he was obliged to do at common law, or putting in bail with the sheriff for his appearance upon the return of *cepi corpus*, and for doing what the court shall order. In two subsequent cases<sup>z</sup>, however, special bail was put in, upon reversing the outlawry, for errors in law, though it does not appear the party came in *gratis*. At length, in the case of *Serecold v. Hampson*<sup>a</sup>, the court, upon considering the words of the 4 and 5 W. and M. c. 18. § 3. which impowers the outlaw to appear by attorney, and says, "The outlawry shall be reversed without bail, in all cases except where special bail shall be ordered by the court," declared they were of opinion, they had a *discretionary* power to require it or not; and that the want of an affidavit *before* the outlawry was no objection<sup>b</sup>, because that is only requisite to warrant an arrest: And though the 31 *Eliz.* c. 3.

<sup>z</sup> *Wall & Wotton*, E. 12      <sup>a</sup> 2 Str. 1178, 9. 1 Willf. G. I. cited in 1 Willf. 4.      3. S. C.  
<sup>z</sup> Str. 951. 2 Barnardist. K.      <sup>b</sup> *Ante*, 65.  
 B. 298. S. C.

§ 3. be the only act that expressly requires bail, it is not to be inferred from thence, that in other cases it ought not to be insisted on; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation money. And it is now settled, that on reversing an outlawry for any other error in law, besides the want of proclamations, the bail is *common* or *special*, in like manner as upon the arrest. Where *special* bail is required, it need not be put in before the allowance of the writ of error; but it is well enough, if put in at any time before the reversal<sup>c</sup>. The recognizance, in such case, is usually taken in the common form<sup>d</sup>; and, by a late determination<sup>e</sup>, the bail may render the defendant, and are not, at all events, answerable for the debt.

In general, an outlawry can only be reversed upon payment of *costs*: But if the process have been abused, and made subservient to purposes of oppression, as where a man has been outlawed, who was already in prison at the plaintiff's suit<sup>f</sup>, or being at large did not abscond, but appeared publickly, and might have been arrested or served with pro-

<sup>c</sup> 1 Ld. Raym. 605. 2 Str.  
951. 2 Barnardist. 298. S. C.

<sup>e</sup> Impey, 456.

<sup>f</sup> 2 Ventr. 46. 2 Salk. 495.

<sup>d</sup> But see 12 Mod. 545. Barnes, 321.  
*per Holt.* & 2 Salk. 496.

cess<sup>e</sup>, the court, on motion, will order the plaintiff to reverse the outlawry at his own expence.

When the outlawry is reversed, or the defendant has obtained a charter of pardon, he may be discharged, if in custody, by writ of *superfedeas*<sup>b</sup>; and his property<sup>i</sup>, if taken into the king's hands, shall be restored to him, by writ of *amoveas manus*, or otherwise, according to the course of the exchequer<sup>k</sup>. Where he has obtained a charter of pardon, he must sue out a *scire facias*, to give notice thereof to the plaintiff, in order that he may further prosecute his action, if he think proper<sup>l</sup>.

<sup>e</sup> T. Jon. 211. Comb. 19. Bunb. 105. and as to chattels *personal*, see 5 Mod. 413.

<sup>b</sup> 13 Car. II. stat. 2. c. 2. 61.

<sup>f</sup> 4. Trye, 122.

<sup>k</sup> Trye, 90.

<sup>i</sup> As to chattels *real*, see Cro. Eliz. 278. 2 Vern. 312.

<sup>l</sup> *Id.* 134, 154.

## C H A P. V.

Of the Proceedings by and against Attornies,  
and other Officers of the Court.

HAVING thus far treated of the mode of proceeding by *original writ*, I shall, in the present chapter, take a view of the proceedings by *attachment of privilege*, at the suit of the *attornies* and other *officers* of the court, and by *bill* against them; first of all, considering their privileges. And though, for the sake of brevity, I shall only mention *attornies*, yet what is said of them must, in general, be understood, as relating equally to all the *officers* of the court.

Where an attorney is *plaintiff*, he is entitled to sue in his own court, by *attachment of privilege*<sup>a</sup>; and may lay the venue in *Middlesex*<sup>b</sup>. Where he is *defendant*, he must be sued in his own court by *bill*<sup>c</sup>, even as ac-

<sup>a</sup> Gilb. C. P. 3.

when it is laid in another

<sup>b</sup> 2 Salk. 668. 4 Bur. 2027. 3 T. R. 573. But an attorney *defendant* has not the privilege of changing the venue into *Middlesex*,county. *Id.* Per cur. H. 24 G. III. 2 Str. 1049. *contra.*<sup>c</sup> 3 Blac. Com. 289.



ceptor of a bill of exchange<sup>d</sup>, or for a debt under forty shillings<sup>e</sup>; and cannot be arrested or holden to special bail<sup>f</sup>. It is also said, that an attorney is entitled to have his cause tried at bar<sup>g</sup>. These privileges are allowed, not so much for the benefit of attornies, as of their clients<sup>h</sup>; and are therefore confined to attornies who practice<sup>i</sup>, or at least have practised within a year<sup>k</sup>: and they are never allowed against the king<sup>l</sup>; but actions *qui tam* are not considered as the king's actions<sup>m</sup>. Neither are they allowed to attornies, as against each other; it being a general rule, that there can be no privilege against privilege<sup>n</sup>. But this rule only applies to attornies of the *same* court<sup>o</sup>; for where they are of *different* courts, the plaintiff is entitled to his privilege. It is also settled, that an attorney shall not be al-

<sup>d</sup> Doug. 299.

<sup>e</sup> 2 Wilf. 42. Doug. 366.

<sup>3</sup> Bur. 1583. *contra*.

<sup>f</sup> 1 Mod. 10.

<sup>g</sup> 6 Mod. 123.

<sup>h</sup> 2 Wilf. 44. 4 Bur. 2113. Doug. 366.

<sup>i</sup> 2 Wilf. 232. 4 Bur. 2115. 2 Blac. Rep. 1086.

<sup>2</sup> Lutw. 1667. *contra*.

<sup>k</sup> *Ridley and Carr*, E. 1656. 1 Lil. P. R. 142.

*Chippendale's case*, E. 19

G. III. *Sand* against *Heybam*,

H. 24 G. III.

<sup>1</sup> 1 Ld. Raym. 27.

<sup>m</sup> T. Raym. 275. 1

Lutw. 196. 3 Lev. 398.

S. C. 1 Salk. 30. 2 Salk. 543.

3 Salk. 282. Comb. 318.

12 Mod. 74. S. C. 1 Blac.

Rep. 373. Cowp. 367.

Barnes, 48.

<sup>n</sup> 4 Bac. Abr. 227.

<sup>o</sup> 2 Str. 1141. 1 Blac.

Rep. 19. Barnes, 44.

lowed

lowed his privilege, where he sues or is sued *in auter droit*, as executor or administrator<sup>p</sup>; or jointly with his wife<sup>q</sup>, or other person who is not privileged<sup>r</sup>; or where there would otherwise be a failure or defect of justice, as where an *appeal*, which only lies in this court, is brought against an attorney of the common pleas<sup>s</sup>; or such an attorney is in the actual custody of the marshal<sup>t</sup>: But where an attorney of the common pleas puts in bail, to an action depending in this court, he does not thereby lose his privilege; but may plead it in that action, or in any other brought against him *by the bye*: for it would be absurd, that he who founds his action on that of another, should be in a better condition than the original plaintiff<sup>u</sup>. Yet where an attorney, having put in bail, waives his privilege, by pleading *in chief*, in one action, it is construed to be a waiver of privilege, in all other actions brought against him *by the bye*, during the same term<sup>v</sup>.

The *attachment of privilege*, at the suit of an attorney, is in nature of a *latitat*: therefore,

<sup>p</sup> Hob. 177. <sup>1</sup> Salk. 2. <sup>4</sup> Bac. Abr. 223.

<sup>1</sup> Ld. Raym. 533. S. C. <sup>q</sup> 1 Saund. 67.

<sup>q</sup> Bro. Abr. tit. *Bill*, pl. <sup>t</sup> 27 Hen. VI. 6. a. 31  
2. Hen. VI. 10. Carth. 377.

<sup>r</sup> 2 Rol. Abr. 274. <sup>12</sup> 1 Salk. 1, 2. <sup>1</sup> Ld. Raym.  
Mod. 163, 4. *Pratt v.* 135. S. C. <sup>12</sup> Mod. 102,  
*Salt, H.* 8 G. II. cited in 112, 535. <sup>1</sup> Str. 191.

in replying it to a plea of the statute of limitations, the plaintiff must set forth the continuances<sup>u</sup>: and, like a *latitat*, it may be sued out, and will warrant proceedings, against several defendants for distinct causes of action. In suing it out, the rule is, that “every attorney shall leave a *præcipe* with the signer of the writs, containing the defendant’s names, not exceeding four in each writ, with the return and day of signing such writ, and the agent’s or attorney’s name who sued out the same: and that all such *præcipes* shall be entered on the roll, where the *præcipes* of *latitats*, and all other writs issuing out of this court, are entered; and the officer, that signs the writs in this court, shall not sign such attachment, till a *præcipe* be left with him for that purpose v.”

An attorney was formerly permitted to hold the defendant to special bail, upon an attachment of privilege, for fees or disbursements, however trifling<sup>w</sup>. But now, since the statutes for preventing frivolous and vexatious arrests, the defendant cannot be arrested and holden to special bail, upon an attachment of privilege, or any other process, unless the cause of action

<sup>u</sup> Carth. 144. i Show. v R. H. 20 G. II.  
 366. 2 Salk. 420. S. C. w R. M. 1654. § 9. Gilb.  
 But see 1 Will. 167. K. B. 346. Gilb. C. P. 36.

amount to ten pounds or upwards. Where it is under that amount, the defendant must be served with a copy of the process, and notice to appear, as in other cases.

The time allowed for declaring upon an attachment of privilege, is the same as upon a *latitat*, or other process in trespass. And if an attorney sue out an attachment of privilege, and deliver or file his declaration, and give notice thereof, four days exclusive before the end of the term wherein the attachment is returnable, the defendant must plead as of that term; the plaintiff having entered a rule to plead, and demanded a plea: but if he do not declare within that time, the defendant may imparl to the next term; and if he do not declare before the effoin day, the defendant will have an imparlance to the term following<sup>x</sup>.

The *bill* against an attorney is a complaint in writing, describing the defendant as *being present in court*<sup>y</sup>; and generally concludes with a *prayer of relief*, though the declaration upon the bill is not demurrable for want of it<sup>z</sup>. Formerly, the bill against an attorney could only have been

<sup>x</sup> R. M. 5 Ann. III. a.  
Gilb. K. B. 346.

<sup>y</sup> 1 Saund. 28, 202. 2  
Saund. 415.

<sup>z</sup> Andr. 247.



filed in term time, *sedente curiâ*, and not in vacation <sup>a</sup>. But now it may be filed in vacation, as well as in term time <sup>b</sup>: though if it be filed in vacation, otherwise than to avoid the statute of limitations, the plaintiff will not be allowed his costs, if the action be settled before the ensuing term.

In practice, it is usual to file the bill, on treble penny stamped parchment, with the clerk of the declarations, in the king's bench office; and to deliver a copy of it, on treble penny stamped paper, to the defendant, with notice thereon to plead in four days <sup>c</sup>. And if the bill be filed, and a copy thereof delivered, four days exclusive before the end of the term, including Sunday, the defendant must plead as of that term; the plaintiff having entered a rule to plead, and demanded a plea: but if the bill be not filed, and copy delivered within that time, the defendant is intitled to an imparlance <sup>d</sup>.

The rest of the proceedings, by and against attornies, are the same as in other cases; only that they are not bound to pay for copies of the pleadings <sup>e</sup>.

<sup>a</sup> 2 Salk. 544. 12 Mod.  
163. Gilb. K. B. 346.

<sup>d</sup> R. M. 5 Ann. III. 4.  
Gilb. K. B. 346.

<sup>b</sup> Doug. 300.

<sup>e</sup> Say. Rep. 77.

<sup>c</sup> Impey, 420.

## C H A P. VI.

Of the Proceedings against Peers of the Realm,  
and Members of the House of Commons.

**T**HERE are two ways of proceeding against peers of the realm, and members of the house of commons; first, by *original* writ, and secondly, by *bill*. We have before treated of the mode of proceeding against them by original writ; and therefore what follows will principally relate to the other mode of proceeding.

At common law, it was not usual to proceed by *bill*, against peers of the realm, or members of the house of commons \*. But now by statute 12 & 13 W. III. c. 3. “ Any person or  
“ persons, having cause of action against any  
“ knight, citizen, or burghers of the house of  
“ commons, or any other person entitled to  
“ privilege of parliament, may prosecute  
“ such knight, &c. in his majesty’s courts of  
“ king’s bench, common pleas, or exchequer,  
“ by summons and distress infinite, or by ori-

\* Trye, 9.

G

“ ginal

“ ginal *bill* and fummons, attachment and  
 “ distrefs infinite; which the faid refpective  
 “ courts are empowered to iffue againft them,  
 “ or any of them, until he or they fhall enter a  
 “ common appearance, or file common bail, to  
 “ the plaintiff’s action, according to the courfe  
 “ of each refpective court.” Since the mak-  
 ing of this ftatute, peers of the realm, and  
 members of the houfe of commons, may be  
 fued by *bill* and fummons, &c. as well as by  
 original writ <sup>b</sup>. But this mode of proceeding  
 is not allowed as againft *unprivileged* perfons <sup>c</sup>.

The *bill* againft a peer of the realm, or mem-  
 ber of the houfe of commons, is a complaint  
 in writing, describing the defendant as *having*  
*privilege of parliament* <sup>d</sup>; and concludes with a  
 prayer by the plaintiff, of procefs to be made to  
 him, according to the form of the ftatute, &c.  
 This bill is filed on treble penny stamped  
 parchment, with the clerk of the declarations,  
 in the king’s bench office <sup>e</sup>: and the firft pro-  
 cefs thereon is a writ of *fummons* <sup>f</sup>; which is a  
 judicial writ, iffuing out of the fame office,  
 and directed to the fheriff of the county

<sup>b</sup> Say. Rep. 63, 4. Cowp. *fon*, H. 23 G. III.  
 844. 2 Ld. Raym. 1442.

<sup>d</sup> Say. Rep. 64.

2 Str. 734. S. C.

<sup>e</sup> Impey, 427.

<sup>c</sup> *Whitworth v. Richard-*

<sup>f</sup> *Id.* 8 Mod. 228.

where

where the venue is laid, commanding him to summon the defendant. Upon this writ the defendant should be summoned, in like manner as upon the original; and, if he do not appear at the return of it, is subject to the like process of *distringas*, &c.

The writ of summons, and other subsequent process upon the *bill*, differ from the process by *original*, in the following particulars, first, that they do not state the cause of action at large, but only require the defendant to answer the plaintiff, generally, *in a plea of trespass on the case, to his damage of, &c.* (according to the plea) *as he can reasonably shew that thereof he ought to answer*<sup>g</sup>; secondly, that they are tested on the very return, and not on the *quarto die post* of the return, of each other; thirdly, that they are made returnable on days *certain*, and not on *general* return days; and fourthly, that there need not be fifteen days between the teste and return of them.

If the defendant appear, he files common bail<sup>h</sup>; and the plaintiff declares against him. The *time* of declaring against a peer of the realm, or member of the house of commons, is the same as in other cases. But there are these differences in the *manner* of declaring:

<sup>g</sup> 2 Crompt. 146. Trye, 127. <sup>h</sup> Impey, 429.



first, that the declaration by *bill* begins with a *memorandum*; and secondly, that in assigning the breach in *assumpsit*, against a peer of the realm, whether by *bill* or *original*, as well as in the *bill* or *original* itself, the plaintiff must not charge the defendant with *contriving and fraudulently intending craftily and subtilly to deceive and defraud him*; for the house of lords have adjudged it a very high contempt and misdemeanor, to charge a member of their house with any species of fraud or deceit<sup>1</sup>.

All further proceedings against peers of the realm, and members of the house of commons, are the same as against other persons<sup>k</sup>; only it should be remembered, that as no *capias* lies against them, they cannot be taken in execution, unless where the judgment is obtained upon a statute staple, or statute merchant, or upon the statute of *Aston Burnel*<sup>l</sup>; in which cases a *capias* lies, even against peers of the realm.

<sup>1</sup> 2 Crompt. 149.

<sup>l</sup> 11 Edw. I.

<sup>k</sup> 8 Mod. 229.

## C H A P. VII.

## Of the Bill and Process in Trespass.

**I**N the former chapters, I have considered the several modes of proceeding by *original writ*, *attachment of privilege*, and *bill against attornies*, &c. in which this court has a jurisdiction, corresponding with that of the common pleas. I shall next explain the mode of proceeding by *bill in trespass*, and against *prisoners*, which are peculiar to this court only.

The *bill* in trespass is a complaint in writing, sometimes called a *queritur* or *plaint*, which properly lies only for a trespass *vi et armis*, committed in *Middlesex*, or other county where the court sits<sup>a</sup>; but, by a fiction of law, it may be the means of commencing an action for any other species of injury. It differs from what is usually termed the *bill of Middlesex*, which is rather a *precept*<sup>b</sup>, or process founded on the bill, than the bill itself, as is evident from the words “by bill,” at the

<sup>a</sup> Trye, 98.<sup>2</sup> Str. 1069.<sup>b</sup> *Id.* 97. 2 Sid. 129.

end of it<sup>c</sup>. And it does not lie against peers of the realm, members of the house of commons, corporations, hundredors, attornies, or prisoners in the actual custody of the marshal<sup>d</sup>.

The first process upon the bill in trespass, was anciently a precept, in nature of an *attachment*<sup>e</sup>; upon which the sheriff returned, either that he had attached the defendant, or that he had nothing by which he could be attached. On the latter return, if the defendant did not appear, there issued into *Middlesex*, or other county where the court sat, a precept in nature of a *capias*, commanding the sheriff of that county to take the defendant, if he should be found in his bailiwick, and safely keep him, so that he might have his body before the king, at a certain time and place therein mentioned, to answer the plaintiff, in a plea of *trespass*, &c. This precept, being now used as the first process in trespass, when the

<sup>c</sup> In Trye's *Jus filizarii*, published in 1684, it is said, that there were several files of bills or complaints in trespass, then remaining in the former upper treasury of this court; and the profits arising from them were formerly so considerable, that they were al-

ways excepted by the chief justice, out of the grant of the office of *custos breviarum*. P. 98, 100.

<sup>d</sup> *Ante*, 20.

<sup>e</sup> Trye, 99. Stat. 8 Eliz. c. 2. Brown's *Vade Mecum*, 526.

defendant is in Middlesex, is therefore (though somewhat improperly), called a *bill of Middlesex*. If the defendant cannot be arrested upon, or served with a copy of this process, the plaintiff may sue out an *alias*, and after that (if necessary), a *pluries* bill of Middlesex; commanding the sheriff, as *before*, or as *oftentimes*, he has been commanded, to take the defendant, &c. But if the defendant be not in Middlesex, the plaintiff must sue out a writ of *latitat*<sup>f</sup>, or *testatum* bill of Middlesex, directed to the sheriff or sheriffs of the county where he is supposed to be, reciting the former process and its return, and suggesting that it is sufficiently *testified* the defendant lurks, and secretes himself in their county. This writ may be issued in the first instance; and if it prove ineffectual, the plaintiff may sue out an *alias*, and after that (if necessary), a *pluries latitat*, or, more properly speaking, an *alias* or *pluries capias*, (for these writs do not contain any *testatum*, or suggestion of a *latitat*); and the *pluries* may be repeated, from time to time, till the defendant be arrested, or served with a copy of it: though, according to some books<sup>g</sup>, there must be a new *latitat*, after four terms from the time of suing out the first. In

<sup>f</sup> Trye, 99.

*Prac. epit.* K. B. 2. *Tamen quære.*

<sup>g</sup> Hanf. introd. 1.



any of these writs, there may be a clause of *non omittas*, commanding the sheriff, that he do not *omit*, on account of any liberty in his county, but that he enter the same, &c. It was formerly holden, that a writ of *latitat*, &c. did not run into *Wales*<sup>h</sup>; but the contrary has been since determined, and is now the common practice<sup>1</sup>.

The bill of Middlesex, and other process into that county, are issued out of the bill of Middlesex office, and signed by the clerk, but not sealed. The *latitat*, and other process thereon, are issued and signed by the signer of the writs, in the king's bench office, and afterwards sealed at the seal office<sup>k</sup>. At the time of issuing them, the plaintiff's attorney should deliver to the officer a *præcipe*<sup>1</sup>, or note of instructions; together with a *memorandum* or minute of his warrant, duly stamped<sup>m</sup>. And it is usual to make the affidavit of the cause of action, at the same time, before the officer or his deputy.

In point of form, the bill of Middlesex, *latitat*, &c. are *general* without, or *special* with a clause of *ac-etiam*. Before the making of the statute 13 Car. II. stat. 2. c. 2. a defendant might

<sup>h</sup> 1 Will. 193.

<sup>1</sup> *Id. ibid.*

<sup>i</sup> Doug. 202, 3.

<sup>m</sup> 25 G. III. c. 80. § 13.

<sup>k</sup> Impey, tit. *Process*.

have

have been arrested, and holden to bail, for any sum of money, upon a *general* bill of Middlesex, *latitat*, &c. not expressing any particular cause of action. It consequently happened, that he was frequently arrested, and holden to bail or imprisoned, for a large sum of money, when perhaps there was no real plaintiff; or little or no cause of action". To remedy this mischief, it was enacted, that "no person arrested by any sheriff, &c. by force or colour of anyailable writ, bill, or process, issuing out of this court, wherein the certainty and true cause of action is not expressed particularly, shall be compelled to give security for his appearance, in any penalty or sum of money, exceeding the sum of forty pounds". This statute (without any such intention in the makers) had like to have ousted the king's bench of all its jurisdiction over civil injuries without force; for as the bill of Middlesex was framed only for actions of trespass, a defendant could not be arrested and holden to bail thereupon, for breaches of civil contracts<sup>p</sup>. But notwithstanding this statute, the defendant might still be arrested, and holden to bail, upon a gene-

<sup>n</sup> See the preamble to the c. 2. statute.

<sup>p</sup> 3 Blac. Com. 287.

<sup>o</sup> Stat. 13 Car. II. stat. 2.

ral bill of Middlesex, *latitat*, &c. for any sum not exceeding forty pounds<sup>9</sup>. And where it was for a larger sum, an expedient was contrived, to preserve the jurisdiction of the court, and at the same time to authorize an arrest, by inserting in the process an *ac-etiam*, or special clause, expressing the true cause of action, in addition to the general complaint of trespass<sup>1</sup>. Where a writ is sued out upon a recognizance of bail, on mesne process, it is necessary, by rule of court<sup>2</sup>, that after the words, *in a plea of trespass*, there should be inserted the following clause, *and also to a bill of the said plaintiff against the said defendant, in a plea of debt upon recognizance, according to the custom of our court before us to be exhibited*; otherwise the defendant, or his attorney, will not be bound to accept of a declaration in debt upon such recognizance. And where two or more defendants, against whom it is intended to proceed in different actions, are joined (as they may be) in one writ, the respective causes of action against them should be distinctly set forth in the *ac-etiam*.

From what has been said, it appears to have been anciently necessary, that the bill of Middlesex, *latitat*, &c. should require the defendant to answer the plaintiff, in a plea of *tres-*

<sup>9</sup> H. Blac. 310.

<sup>2</sup> R. E. 15 G. II.

<sup>1</sup> Trye, 102, 3.

*pafs*<sup>t</sup>. But there are several modern cases to the contrary. In one of them<sup>u</sup>, a motion was made to stay the proceedings on a bill of Middlesex, which was in *debt* only, and not in *trespafs*, with an *ac-etiam* in *debt*; and the court ordered the bill to be *amended*, by inserting the plea of *trespafs*. In a subsequent case<sup>v</sup>, where the bill of Middlesex was to answer the plaintiff in a plea of *debt*, instead of *trespafs*, and also to a bill to be exhibited in a plea of *trespafs* upon the case, the court refused to grant a rule for setting it aside, on the authority of a case, which was read from the master's note book, exactly in point<sup>w</sup>.

The *alias capias*, &c. should correspond with the previous process, in the names of the parties. Therefore, in a late case<sup>x</sup>, where an action was brought against *Bates* and another, for an act done by them as justices of the peace, and the *latitat* against *Bates* was by the name of *William*, and the *alias* by the name of *John*, the court thought the proceedings irregular, and set them aside, as far as they respected *Bates*.

The bill of Middlesex, being merely a *precept*<sup>y</sup>, has no direction or teste. But the *writ*

<sup>t</sup> 2. Str. 1072.

<sup>u</sup> 1 Blac. Rep. 462.

<sup>v</sup> 2 T. R. 513.

<sup>w</sup> M. 20 G. III. The same application was also refused

in H. 24 G. III. 2 T. R.

513. (a).

<sup>x</sup> 3 T. R. 660.

<sup>y</sup> *Ante*, 85.



of *latitat* should be directed to the sheriff, or sheriffs of the county, where the defendant is supposed to be; or, if the sheriffs be parties, to the *coroners*<sup>z</sup>; and if they also be parties, to *elisors* named by the master<sup>a</sup>. In a county palatine, or cinque-port, where the court cannot write directly to the sheriff<sup>b</sup>, the *latitat* should be directed to the proper officer; as in *Durham*, to the *bishop*, or his chancellor; in *Cheshire*, to the *chamberlain*, or his deputy; in *Lancashire*, to the *chancellor*, or his deputy; and in a cinque-port, to the *constable* of Dover castle, his deputy or lieutenant. In these cases, the mandatory part of the writ is different from the common form; and if the officer, to whom it is directed, refuse to receive it, he is liable to an attachment<sup>c</sup>.

The *latitat* should be tested in the name of the chief justice, or senior judge of the court, if there be no chief justice; and it may be tested before the cause of action<sup>d</sup>. If it be sued out in term time, it is usually tested on the first day of that term; and, if sued out in vacation, on the last day of the preceding one<sup>e</sup>: for if tested in vacation, it is

<sup>z</sup> 1 Blac. Rep. 506.

<sup>d</sup> 2 Bur. 967.

<sup>a</sup> Impey, 137.

<sup>e</sup> 3 Keb. 214. T. Jon.

<sup>b</sup> 2 Str. 1089. Andr. 190. 149. 1 Ventr. 363. 2 Bur. S. C. 962.

<sup>c</sup> *Id. ibid.*

merely

merely void<sup>f</sup>. This writ should be made returnable on a day *certain*, in term time<sup>g</sup>; as on *Monday*, on, or next after, *the morrow of All Souls*, &c. But it must not be tested, or returnable, on a *dies non juridicus*; as on *Sunday*, the feast of the *purification* in Hilary term, *ascension day* in Easter term, or *midsummer day* (if it happen) in Trinity term, unless it be on the *Friday* next after Trinity Sunday; in which case it is *dies juridicus* by the 32 Hen. VIII. c. 21<sup>h</sup>. It should also be observed, that as there are more than seven days, between the morrow of All Souls and the morrow of St. Martin, in Michaelmas term, the day before the morrow of St. Martin, being the 11th of November, is not the week-day *next* after the morrow of All Souls; and therefore on this day, the *latitat* should be made returnable on *Monday* (or other day of the week, being) *the feast of St. Martin*. There is no necessity for any particular number of days, between the teste and return of a *latitat*: even one has been deemed sufficient<sup>i</sup>. Though, as the process is *de die in diem*, it cannot be made returnable on the day of suing it out<sup>k</sup>.

<sup>f</sup> 2 Bur. 954, 967. 5 Bur. 2588. 2 Blac. Rep. 683. S. C. <sup>i</sup> 2 Str. 917. 2 Barnardist. K. B. 60. S. C.

<sup>g</sup> 1 Str. 399.

<sup>h</sup> 2 Inst. 264, 5.

<sup>k</sup> 2 Ld. Raym. 777. 2 Salk. 421. 7 Mod. 12. S. C.

What has been said, with regard to the direction, teste, and return of the *latitat*, is applicable to the *alias capias*, and other subsequent process; and it may be further observed, that each *succeeding* writ should be tested on the return day of the *preceding* one.

It will here be proper to take notice of some things that are required, by act of parliament, to be set down, subscribed to, or indorsed upon the process<sup>1</sup>. And *first*, by the statutes 5 & 6 W. & M. c. 21. § 4. and 9 & 10 W. III. c. 25. § 42. made for preventing abuses committed by arresting persons, without any writ or legal process to justify the same, and by that means evading the stamp duties thereon; “the officer, who shall sign any  
 “ writ or process, to arrest any person or persons  
 “ before judgment, shall, at the signing thereof,  
 “ set down upon such writ or process, the day  
 “ and year of his signing the same.” And by a subsequent statute<sup>m</sup>, made for the like purposes “every warrant, issuing upon any  
 “ such writ or writs, shall have the same day  
 “ and year, plainly and distinctly set down  
 “ thereon, as shall be so set down on the writ  
 “ itself.”

<sup>1</sup> These things are not to the process by *original*.  
 peculiar to the process in <sup>m</sup> 6 G. I. c. 21. § 54.  
*trespass*, but equally apply

The indorsement of the date is said to be no part of the writ; and therefore, if the *teste* be right, the court will not set aside the proceedings, for a mistake of the indorsement<sup>n</sup>. But where, in an action against an attorney for negligence, in not proceeding to judgment and execution in due time, the bill of Middlesex against the original defendant (having no *teste*) was stated, under a *videlicet*, to have issued on the 24th of January 1785, returnable on *Monday* next after fifteen days of St. Hilary in the same year, which was really the fact; but by a mistake of the indorsement, it appeared in evidence to have issued on the 24th of January 1784; the plaintiff was nonsuited: and on a motion for a new trial, the court were all of opinion, that the time of proceeding against the original defendant depending on the return of the writ, the *return* became material, and therefore the variance was fatal<sup>o</sup>.

*Secondly*, by the statute 12 G. I. c. 29. § 2.  
 “ the sum or sums, specified in the affidavit  
 “ of the cause of action, shall be indorsed on  
 “ the back of the writ or process; for which  
 “ sum or sums so indorsed, the sheriff or other  
 “ officer shall take bail, and for no more.”  
 This statute, however, is merely *directory* to the sheriff; and does not avoid the process,

<sup>n</sup> 1 Wils. 91.

<sup>o</sup> 1 T. R. 656.

where



## Of the Bill and

where the sum sworn to is not indorsed upon it<sup>P</sup>.

*Thirdly*, by the statute 2 G. II. c. 23. § 22.  
“ every writ and process, for arresting the  
“ body, and every writ of execution, or some  
“ label annexed to such writ or process, and  
“ every warrant that shall be made out there-  
“ on, shall, before the service or execution  
“ thereof, be subscribed or indorsed with the  
“ name of the attorney, clerk in court, or so-  
“ licitor, written in a common legible hand, by  
“ whom such writ, &c. respectively shall be sued  
“ forth: and where such attorney, &c. shall not  
“ be the person, *immediately* retained or employ-  
“ ed by the plaintiff, then also with the name of  
“ the attorney, &c. so *immediately* retained or  
“ employed, to be subscribed or indorsed and  
“ written in like manner. And that every  
“ *copy* of any writ or process, that shall be  
“ served upon any defendant, shall, before  
“ the service thereof, be in like manner sub-  
“ scribed or indorsed, with the name of the  
“ attorney or solicitor, who shall be *imme-*  
“ *diately* retained or employed by the plain-  
“ tiff.” But, by the statute 12 G. II. c. 13.  
§ 4. “ the not subscribing or indorsing the  
“ name of the attorney, &c. on any warrant  
“ that shall be made out upon any writ, &c.

P 1 Bur. 330. Barnes, 414. H. Blac. 76.

“ shall not vitiate the same; but such writ,  
 “ &c. and all proceedings thereon, shall be as  
 “ valid and effectual, notwithstanding such  
 “ omission, as if the lastmentioned act had  
 “ not been made: provided the writ, where-  
 “ on such warrant is made out, be regularly  
 “ subscribed or indorsed, according to the act.”

Since the making of this statute, though the omission of the attorney's name upon the *warrant*, which is the act of the sheriff, will not vitiate the proceedings<sup>1</sup>, yet, if it be not subscribed to or indorsed on the writ or *copy*<sup>2</sup>, they may be set aside for irregularity.

Where the cause of action does not amount to ten pounds, and the defendant is served with a copy of the process, there must be an English notice thereon, of the intent and meaning of such service<sup>3</sup>; which in effect reduces it to a mere *summons*<sup>4</sup>. But where the cause of action amounts to ten pounds or upwards, and no affidavit is made thereof, a notice is unnecessary<sup>5</sup>.

The notice to appear, when necessary, must be directed to the defendant<sup>6</sup>; for if his name be not prefixed thereto, the process is irregu-

<sup>1</sup> Barnes, 414.

<sup>2</sup> *Id.* 415. *Wright*, and another. v. *Willes*, M. 21 G. III.  
*Per cur.* T. 29 G. III.

<sup>3</sup> Stat. 5 G. II. c. 27. § 4.

<sup>4</sup> Cowp. 455.

<sup>5</sup> 1 Willf. 22.

<sup>6</sup> *Kelynge*, 131. 1 Willf.

lar, and may be quashed on motion. And it should require the defendant to appear, at the return of the process, though it happen on a Sunday<sup>w</sup>. But any trifling informality in the notice, as setting down the day of the month, on which the defendant is to appear, without saying, *instant*, *next*, or specifying the *year*, will not invalidate it<sup>x</sup>.

If the process be defective in point of form<sup>y</sup>, or in its direction<sup>z</sup>, teste<sup>a</sup>, or return<sup>b</sup>, or the attorney's name be not indorsed upon it<sup>c</sup>, or if there be no notice to appear<sup>d</sup>, (when necessary,) or the notice be not properly directed<sup>e</sup>, the defendant may move the court to set aside the proceedings. But he cannot take advantage of any error or defect in the process, after he has appeared to it<sup>f</sup>, or taken the declaration out of the office<sup>g</sup>. And, in general, the process may be *amended*, where there is any thing to amend by<sup>h</sup>.

<sup>w</sup> 3 Bur. 1600.

<sup>x</sup> 2 Str. 1233. Barnes,

425.

<sup>y</sup> 3 T. R. 660.

<sup>z</sup> 1 Blac. Rep. 506.

Barnes, 422.

<sup>a</sup> 2 Bur. 954, 967. 5 Bur.

2588. 2 Blac. Rep. 683.

S C. Barnes, 407, 8, 9.

420.

<sup>b</sup> 1 Str. 399.

<sup>c</sup> *Wright*, and another, v.

*Willes*, M. 21 G. III. *Per*  
*Cur.* T. 29 G. III.

Barnes, 415.

<sup>d</sup> 2 Str. 1072.

<sup>e</sup> *Kelynge*, 131. 1 Wilf.

104.

<sup>f</sup> 1 Str. 155. Barnes, 163,

167, 415.

<sup>g</sup> 2 Str. 1072. *Wright*,

and another, v. *Willes*, M.

21 G. III.

<sup>h</sup> 1 T. R. 782.

## C H A P. VIII.

Of the Proceedings upon the *Capias*, &c. previous to the Defendant's Appearance.

THERE are two ways of proceeding upon the *capias*, and other subsequent process against the person of the defendant, by *original writ*, *attachment of privilege*, or *bill in trespass*: first, by *service* of a copy of the process; secondly, by *arrest*.

Where the cause of action is under ten pounds, or no affidavit is made thereof, when it amounts to ten pounds or upwards, the defendant, we may remember, is to be personally served with a copy of the process; by which is to be understood, in general, a copy of such process as he might have been arrested upon, before the statute 12 Geo. I. c. 29: and therefore, where the proceedings are by *original*, he should be served with a copy of the *capias*, and not of the *original writ of summons* or *attachment*<sup>a</sup>. But where the defendant is in a county palatine, he should be served with a copy of the process, issuing out of this court; and not of the *mandate*, from the

<sup>a</sup> Barnes, 406, 410.



officer to whom it is directed<sup>b</sup>. The copy of the process may be served by the sheriff or his officers, (except in particular franchises, having the return of writs,) or by any one else<sup>c</sup>, provided he be able to examine the copy with the original, so as to swear (if necessary) to the service. In particular franchises and jurisdictions, the proper officer there should execute the process<sup>d</sup>. Formerly, a copy of the process must have been served on the defendant *before* the return day<sup>e</sup>; but now it is holden, that service at any time, even after the rising of the court, *on* the return day, is sufficient<sup>f</sup>. A bill of *Middlesex* should not be served in *London*, or elsewhere out of the county of *Middlesex*<sup>g</sup>; nor whilst the defendant is attending his cause at the sittings<sup>h</sup>: but where there is any dispute as to the boundaries of the county, the court will not determine it on motion<sup>i</sup>. And it should seem, that a *latitat* may be served in any county<sup>k</sup>. On serving the copy, it is not necessary, though usual, to shew the original process<sup>l</sup>, unless demanded<sup>m</sup>.

<sup>b</sup> 2 Barnardist, 318, 327, 192.Pr.Reg.352. 2 Wilf.372.  
337, 398. Pr. Reg. 344. <sup>g</sup> Doug. 369. 1 T. R. 187.  
Barnes, 406. <sup>h</sup> 2 Str. 1094.

<sup>c</sup> Pr. Reg. 345.

<sup>i</sup> 1 Wilf. 77.

<sup>d</sup> Stat. 5 G. II. c. 27. § 3.

<sup>k</sup> Doug. 369. 1 T. R. 187.

<sup>e</sup> Barnes, 415, 424.

<sup>l</sup> 2 Str. 877. Barnes, 422.

<sup>f</sup> 2 Bur. 812. 1 T. R.

<sup>m</sup> Cas. temp. Hardw. 138.

And in an action against husband and wife, it is deemed sufficient to serve the husband only<sup>n</sup>.

If, upon the service, the defendant speak contemptuous words of the *court*, or its *process*, he is liable to an *attachment*. And where the words are spoken of the *court*, the attachment issues in the first instance<sup>o</sup>; for it would be to no purpose to grant a rule to shew cause, which would probably expose the court to further insult<sup>p</sup>. It has been doubted, however, whether, when such words are sworn to by one person only, the rule should be absolute, or only to shew cause<sup>q</sup>; the rule in *chancery* requiring two affidavits, to deprive the party of the benefit of shewing cause: and in this court, the rule is only to shew cause, where the words are spoken of its *process*<sup>r</sup>.

An *arrest* must be by corporal seising or touching the defendant's body<sup>s</sup>; and, except in counties palatine or particular liberties, is made by the sheriff, or other officer to whom the writ is directed, or by his *general* or *special* bailiff. The sheriff's authority is derived from the *writ*; and that of his bailiff, from a *warrant*

<sup>n</sup> Barnes, 406, 412. Pr.  
Reg. 351. S. C.

<sup>o</sup> 6 Mod. 43. 1 Salk. 84.  
1 Str. 185. Say. Rep. 47.

<sup>p</sup> 1 Salk. 84.

<sup>q</sup> 2 Str. 1068.

<sup>r</sup> Say. Rep. 114.

<sup>s</sup> 3 Blac. Com. 288.

in writing, which ought not to be made out until the sheriff have the writ in his actual custody<sup>t</sup>. The arrest may be made by the sheriff, or his bailiff, at any *time* before, or *on* the day of the return of the writ; and at any *place* within the county, except where the defendant is privileged. But it cannot be made, between the day of the return and *quarto die post*, by original<sup>u</sup>. In counties palatine, the arrest is made by the sheriff, or his bailiff, by virtue of a *mandate* from the officer, to whom the writ is directed. And in a particular liberty, having the return of writs, it should regularly be made (except upon a *non omittas*) by the bailiff of the liberty, by virtue of a *mandate* from the sheriff<sup>v</sup>. If there be two liberties in a county, and the sheriff make his mandate to the bailiff of one of them, who gives him no answer, he may, upon a *non omittas*, arrest the defendant in either liberty<sup>w</sup>; and even if the sheriff enter, and arrest the defendant in a liberty, without a *non omittas*, the arrest is good, though the sheriff may be liable to an action<sup>x</sup>. In making the arrest, it is not necessary that the officer, who

<sup>t</sup> R. E. 15 Car. II. 4. Stat.  
6 G. I. c. 21. § 53.

<sup>u</sup> 1 Sid. 229.

<sup>v</sup> Gilb. C. P. 25, &c.

<sup>w</sup> 5 Co. 92. a. Gilb. C. P. 29.

<sup>x</sup> Gilb. C. P. 27. *Fitzpatrick v. Kelly*, 22 G. III.

has the *authority*, should be the *hand* that arrests, nor in the presence of the person arrested, nor actually in sight, nor is any exact distance prescribed: it is sufficient that he be near, and acting in the arrest<sup>y</sup>.

When the defendant is arrested, he either remains in custody of the sheriff, or other officer, who arrested him; or is let out of custody upon bail, or an attorney's undertaking for his appearance; or escapes, or is rescued, &c.

Before the statute 23 Hen. VI. c. 9. the sheriff was not obliged to bail a defendant, arrested upon mesne process, unless he sued out a writ of *mainprize*; though he might have taken bail of his own accord<sup>z</sup>. This arbitrary power produced great extortion and oppression of the subject; to remedy which, it was enacted, by the above statute, “ that  
 “ sheriffs, &c, shall let out of prison all man-  
 “ ner of persons arrested, or being in their  
 “ custody, by force of any writ, bill, or war-  
 “ rant, in any action personal, or by cause  
 “ of indictment of trespass, upon reasonable  
 “ sureties of sufficient persons, having suffi-  
 “ cient within the counties, where such per-

<sup>y</sup> Cowp. 65.

356. And see 1 Ventr. 55,

<sup>z</sup> Gilb. C. P. 20, 21. 4 85. 2 Saund. 60. H. Blac.  
 Bac. Abr. 461. F. N. B. 233.  
 251. Plowd. 67. Dalt. Sher.



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 Bac. Abr. 461. F. N. B. 233.  
 251. Plowd. 67. Dalt. Sher.

“ sons be so let to bail or mainprize, to keep  
 “ their days in such place, as the said writs,  
 “ bills, or warrants shall require; persons be-  
 “ ing in their ward by condemnation, execu-  
 “ tion, *capias utlagatum* or *excommunicatum*,  
 “ surety of the peace, or by special command-  
 “ ment of any justice, and vagabonds refusing  
 “ to serve according to the statute of labour-  
 “ ers, only excepted.”

“ And that no sheriffs, &c. shall take, or  
 “ cause to be taken, any obligation, for any  
 “ cause aforesaid, or by colour of their office,  
 “ but only to themselves, of any person, nor  
 “ by any person, which shall be in their ward  
 “ by course of law, but by the name of their  
 “ office; and upon condition written, that the  
 “ prisoners shall appear at the day and place  
 “ contained in the writ, bill, or warrant.  
 “ And if any sheriffs, &c. take any obliga-  
 “ tion in other form, by colour of their of-  
 “ fice, it shall be void.”

This statute hath two branches, first, as to the persons to be let to bail; and, secondly, as to the form of the security. Upon the first branch of the statute, it has been determined, that the sheriff cannot take bail on an attachment for a contempt<sup>a</sup>. And though the

<sup>a</sup> 1 Str. 479. Com. Rep. 264. 2 Salk. 608. *contra*.

words of it seem to be confined to persons arrested, and in actual custody, yet it has been holden, that the arrest need not be stated, in an action upon the bail bond <sup>b</sup>; and if stated, it is not traversable <sup>c</sup>: for it would be of mischievous consequence, if a bail bond taken civilly, without exposing the party by an arrest, were not as effectual as if he had been actually arrested. Where the defendant is arrested, and in actual custody, it is the duty of the sheriff to take bail, if required: and therefore if a bail bond be tendered, with sufficient sureties, and the sheriff refuse to accept it, he is liable to a special action on the case <sup>d</sup>. The clause, which requires reasonable sureties, was introduced for the benefit of the sheriff; and therefore, though he may insist upon two sureties, yet he may take a bond with *one* only <sup>e</sup>. And for the same reason, the plaintiff cannot maintain an action against him, for taking sureties that are insufficient, or do not inhabit within the county <sup>f</sup>.

<sup>b</sup> 1 Str. 643.

<sup>f</sup> Cro. El. 808, 852, 862.

<sup>c</sup> Id. 444. Say. Rep. 116. Noy, 39. 1 Sid. 96. 2 Saund. 59. 1 Mod. 227, 239. 2

<sup>d</sup> Gilb. C. P. 20. W. Mod. 83, 177. But see 1 Ld. Jon. 226. 1 Sid. 22. 2 Mod. Raym. 425. 1 Salk. 99. 31, 84, 180. 2 Vent. 96. S. C. 6 Mod. 122. *semb.*

<sup>e</sup> 10 Co. 100. b. Cro. El. *contra.*  
624, 808, 852, 862.



The second branch of the statute requires a security by bond<sup>g</sup>; respecting which, there are three forms to be observed; first, that it be made to the sheriff himself; secondly, that it be made to him, by his name of office; and, thirdly, that it be only for the defendant's appearance, at the return of the writ<sup>h</sup>. Therefore, if the bond be not made to the sheriff<sup>i</sup>, or be not made to him by his name of office<sup>i</sup>, or if it be single without any condition at all<sup>j</sup>, or with an impossible condition<sup>k</sup>, or the condition be not for the defendant's appearance<sup>i</sup>, or be for that and something else<sup>i</sup>, it is void by the statute. If the objection appear on the face of the declaration, or upon *oyer*, the defendant may demur; but otherwise he should plead it: and when, by pleading or otherwise, it appears in any part of the record, he may move in arrest of judgment<sup>l</sup>.

If the bond be substantially good, it cannot be avoided for any trifling informality, or variance of the condition from the writ, in the description of the plea, or of the time or place

<sup>g</sup> 1 T. R. 421.

<sup>k</sup> 3 Lev. 74. 1 Str. 399.

<sup>h</sup> Cro. El. 862. 4 Bac. Fort. 363. S. C. 2 T. R. Abr. 462.

569.

<sup>i</sup> Dyer, 119, 120. 10 Co. <sup>l</sup> 2 T. R. 569.

100. a. b.

of appearance. Thus, where the writ was to answer the plaintiff in a plea of debt, *for three hundred and twenty pounds*, or in a plea of trespass, *with an ac-etiam*, and the condition was to answer the plaintiff in a plea of debt, or trespass, *generally*, or without mentioning the plea at all, the variances were holden to be immaterial<sup>m</sup>; for the statute only requires a bond conditioned for the defendant's appearance, and the description of the plea is merely surplusage. So where the writ, in *trespass*, was to appear before *the lord the king* at Westminster, and the condition was to appear before *the justices of the king's bench* at Westminster<sup>n</sup>, the bond was holden good. And where the writ, by *original*, was returnable before the lord the king, *wheresoever he shall then be in England*, and the condition was without the words *wheresoever*, &c. the court gave judgment for the plaintiff, in an action upon the bond; saying, they would understand, that by appearing before the king was meant, before the king in his *court*, and not before the king in

<sup>m</sup> Cro. Jac. 286. 2 Lev. Mod. 327. But see 2 Lev. 123. 2 Show. 51. T. Jon. 177. *semb. contra.*  
<sup>n</sup> 2 Lev. 180. T. Jon. 46.  
 137, 8. 6 Mod. 122. 10 S. C. 2 Ventr. 237, 8.

*person.*

*person*<sup>o</sup>. It has also been holden, that the statute for preventing frivolous and vexatious arrests<sup>p</sup> is merely *directory* to the sheriff, and does not avoid the bail bond, where there is no affidavit of the cause of action<sup>q</sup>, or the sum sworn to is not indorsed on the writ<sup>q</sup>; or even where the sheriff takes bail for more than the sum sworn to<sup>r</sup>.

The provisions of the statute of Hen. VI. are not applicable to securities taken by, or for the benefit of the plaintiff<sup>s</sup>. And hence, an attorney is bound by his undertaking to appear for the defendant, though it be not exactly in the form prescribed. By an old rule of court<sup>t</sup>, "a prisoner taken upon a *capias* shall not be discharged, till he hath given bond to appear; unless the plaintiff or his attorney shall consent to take an appearance, without bail." But it is now the common practice to take an attorney's undertaking, where special bail is required; and the court will enforce it by attachment<sup>u</sup>.

Where the sheriff, having arrested the defendant, suffers him to go at large, upon giving

<sup>o</sup> 2 Str. 1155, 6.

<sup>p</sup> 12 G. l. c. 29.

<sup>q</sup> 1 Bur. 330.

<sup>r</sup> *Nordon v. Horsley*, cited in 1 Bur. 331. H. Blac. 76.

<sup>s</sup> Cro. El. 190. 1 Sid.

132. 1 Lev. 98. S. C. 3

Mod. 205.

<sup>t</sup> R. M. 1654. § 6.

<sup>u</sup> 1 T. R. 422.

bail

bail for his appearance at the return of the writ, he is not liable to an action of *escape*; for he was obliged by the statute to take bail<sup>v</sup>. And even where he suffers him to go at large without bail, he is not, it seems, liable to an action, provided he have him at the return of the writ<sup>w</sup>. But if he have him not then, or afterwards suffer him to go at large, without lawful authority, he is, in either case, liable to an action<sup>x</sup>. And where an action is brought against the sheriff, after he has taken bail, he must plead the statute; and cannot take advantage of it, on demurrer to the declaration, or in arrest of judgment<sup>y</sup>.

Where the defendant is *rescued* upon mesne process, as he is going to prison, the sheriff may return the rescue<sup>z</sup>; but not, where the defendant is rescued, after he is put in prison, except by the king's enemies<sup>a</sup>. Upon the sheriff's return of a *rescue*, the plaintiff has a triple remedy against the rescuers, by attachment, ac-

<sup>v</sup> Cro. El. 624. 852. Noy, Ventr. 85. 1 Mod. 33, 57. 39. S. C. 1 Sid. 23. 1 Ventr. S. C. 2 Saund. 154, 5. 55. 3 Salk. 314, 15. Gilb. <sup>z</sup> Cro. Jac. 419. 3 Bulst. C. P. 22. 198. 1 Rol. Rep. 388, 440.

<sup>w</sup> 2 T. R. 172.

S. C. 3 Lev. 46. 1 Str.

<sup>x</sup> Noy, 39. 1 Mod. 228, 435. Gilb. C. P. 23. but 9. 2 Mod. 178. S. C. Gilb. see Cro. El. 868. *contra*. C. P. 22. 2 T. R. 174, &c. <sup>a</sup> Cro. Jac. 419. 1 Rol.

<sup>y</sup> Cro. El. 460. Moor, 428. Rep. 441. 1 Str. 435. 5 S. C. 1 Sid. 22, 439. 1 Bur. 2814.



tion on the case, or indictment<sup>b</sup>. The return of a rescue is of itself a conviction<sup>c</sup>; and the court will grant an *attachment* upon it, in the first instance<sup>d</sup>, which should be made returnable at a *general* return, though the original process was at a day *certain*<sup>e</sup>. But, without the sheriff's return, the court will not grant an attachment, upon a mere affidavit of the fact<sup>f</sup>. It was formerly the constant course, upon the return of a rescue, to set a certain fine of four nobles on each offender<sup>g</sup>: but of late years, the courts have fined according to their discretion, upon considering the circumstances of the case<sup>h</sup>. And as the sheriff's return of a rescue is not traversable, the court will proceed to punish the rescuers, without going through the ordinary course of examining them upon interrogatories<sup>i</sup>.

<sup>b</sup> Com. Dig. tit. *Rescous*,  
D.

<sup>c</sup> Cas. temp. Hardw. 112.

<sup>d</sup> 2 Salk. 586. Say. Rep.  
121. 4 Bur. 2129.

<sup>e</sup> 1 Str. 624.

<sup>f</sup> 2 Salk. 586. 6 Mod.  
141. 1 Str. 531.

<sup>g</sup> T. Jon. 1982. Salk. 586.

<sup>h</sup> 1 Str. 642.

<sup>i</sup> 4 Bur. 2129.

## C H A P. IX.

## Of Appearance.

I N the present chapter, I shall consider the appearance of the parties, which is either in *person* or by *attorney*; or, in case of infancy, by *prochein amy* or guardian.

At common law, the plaintiff and defendant must, in general, have appeared in *person*; and could not have appeared by *attorney*, without the king's special warrant, by writ or letters patent <sup>a</sup>. But a *corporation* aggregate, not being capable of a personal appearance, could only have appeared by *attorney*, appointed under their common seal <sup>b</sup>. And now, by the statute of *Westm. 2. c. 10.* a general liberty is given to the parties, of appearing by *attorney* <sup>c</sup>. Yet there are certain persons, such as ideots, feme-coverts, &c. who, for want of legal discretion, are incapable of appointing an attor-

<sup>a</sup> Co. Lit. 128. a. 2 Inst. 249, 378. F. N. B. 25. 1 Mod. 244. 2 Mod. 83. S. C.

<sup>b</sup> Bro. Abr. tit. *Corporation*, 28. Co. Lit. 66. b.

<sup>c</sup> Gilb. C. P. 32, 3. 2 Inst. 376. F. N. B. 55.

ney;

ney; and must therefore appear in person<sup>d</sup>: and any one else, if he think proper, may still appear, and prosecute or defend his suit, in the same manner<sup>e</sup>; as is usually done by attornies and prisoners.

Attornies were anciently appointed in court, when actually present<sup>f</sup>: but they are now usually appointed out of court by *warrant*, which should regularly be in *writing*; but an authority by *parol* is said to be sufficient to support a judgment<sup>g</sup>. And even if an attorney appear without warrant, it is a good appearance as to the court; though he is liable to an action<sup>h</sup>. Where an attorney once appears, or undertakes to be attorney for another, he shall not be permitted to withdraw himself<sup>i</sup>; and it is said to be his duty to proceed in the suit, although his client neglect to bring him money<sup>k</sup>.

The warrant of attorney continues in force until the judgment, and for a year and a day afterwards, in order to have execution<sup>l</sup>; unless it be sooner countermanded by the act of the principal, or determined by the death of the

<sup>d</sup> Co. Lit. 135. b. 2 Inst. 88. 6 Mod. 16. But see 1 390. F. N. B. 27. T. R. 62.

<sup>e</sup> Say. Rep. 217.

<sup>i</sup> 1 Sid. 31.

<sup>f</sup> 1 Willf. 39.

<sup>k</sup> Say. Rep. 173.

<sup>g</sup> 2 Keb. 199. 1 Lil. P. R. 134, 137.

<sup>l</sup> 2 Inst. 378. Gilb. Exec. 92, 3. Run. Ej. 152.

<sup>h</sup> 1 Keb. 89. 1 Salk. 86,

attorney.

attorney. Where an attorney, having been retained, has undertaken to appear, the defendant cannot countermand the appearance after his retainer<sup>m</sup>; nor can he change his attorney, at any time pending the suit, without leave of the court, or a judge, and notice to the adverse party or his attorney<sup>n</sup>. If an attorney *die* pending the suit, his warrant is determined<sup>o</sup>: but the party who employed him must have notice of his death; and if he will not appoint another attorney, his adversary may proceed in the action<sup>p</sup>.

At common law, the warrant of attorney might have been filed, and entered of record, at any time before judgment<sup>q</sup>: but there are several acts of parliament<sup>r</sup>, requiring it to be done sooner, under severe penalties. By the last of these acts it is provided, that “the attorney for the plaintiff shall file his warrant of attorney, with the proper officer, the same term he declares; and the attorney for the defendant, the same term he appears, under the penalties inflicted by former laws.” Upon

<sup>m</sup> R. M. 1654. § 10. 1      <sup>q</sup> 41 Ed. III. 1. b. but see  
Lil. P. R. 134, 143.      1 Wilf. 39.

<sup>n</sup> *Id.* 1 Blac. Rep. 8.      <sup>r</sup> 18 Hen. VI. c. 9. 32  
Doug. 206.      Hen. VIII. c. 30. f. 2, 3. 18

<sup>o</sup> 1 Lil. P. R. 141.      Eliz. c. 14. f. 3. 4 & 5

<sup>p</sup> *Id.* 137. 2 Keb. 275.      Ann. c. 16.



this act of parliament, there is a rule of court', "that the defendant's attorney, at the  
 "time of his appearance, shall give the plaintiff's attorney, the warrant of attorney for the  
 "defendant; and at the time of delivering  
 "the copy of the declaration, or taking it out  
 "of the office, when filed, shall pay fourpence  
 "for the said warrant: which warrant of attorney the plaintiff's attorney shall file, with  
 "the officer appointed for filing it, at the same  
 "time he files, or ought to file, the warrant of  
 "attorney for the plaintiff. And if the defendant's attorney refuse to pay the same,  
 "the plaintiff's attorney may sign judgment." Notwithstanding these regulations, however, it has been determined, that the warrants of attorney may be *filed*, so as to support the proceedings, at any time *pendente lite*, or before final judgment; though the attorney may be fined, for not filing them in due time<sup>1</sup>. It was anciently the course of this court, to *enter* the warrants of attorney on a particular roll, kept for that purpose<sup>2</sup>: but this course was altered in the time of *Wright*, ch. J. who caused them

<sup>1</sup> R. M. 5 Ann. II.

1532. S. C. Fitzgib. 191.

<sup>2</sup> Dyer, 180, 225. Cro. 1 Wilf. 39, 183. Doug. Jac. 277. March, 121. 8 110.

Mod. 77. 1 Str. 526. 2 " 1 Salk. 88.

Str. 807. 2 Ld. Raym.

to be entered on the top of the plea roll <sup>v</sup>, as the practice is at this day. The *want* of a warrant of attorney is *aided* after verdict <sup>w</sup>, or judgment by *nil dicit* <sup>x</sup>, &c. by the statutes of jeofails: and by the statute of 8 Hen. VI. c. 12. a misprision of the clerk in the warrant may be *amended*, in affirmance of the judgment <sup>y</sup>.

It only remains to be observed, with regard to the warrant of attorney, that by a late act of parliament <sup>z</sup>, which subjects it to a stamp duty, “no attorney shall sue out any writ or  
“process, or commence, prosecute, or defend  
“any action, unless he shall have delivered to  
“the officer or his deputy, appointed to sign or  
“issue the first process for the plaintiff, or to  
“enter, file, or record the bail or appearance  
“for the defendant, a *memorandum* or minute  
“of his warrant, duly stamped; containing the  
“names of the parties, the court, and the at-  
“torney, and, where a *præcipe* is required, (ex-  
“cept for an original,) the nature and denomi-  
“nation of the process, and the return of it;  
“which *memorandum* or minute the said officer  
“or his deputy shall receive, and forthwith

<sup>v</sup> 1 Salk. 88. R.E. 4 Jac. II.

<sup>y</sup> Doug. 109.

<sup>w</sup> 18 Eliz. c. 14.

<sup>z</sup> 25 G. III. c. 80. § 13,

<sup>x</sup> 4 & 5 Ann. c. 16. and see &c.

<sup>y</sup> Wilf. 85.

“ enter or file of record, and shall sign thereon  
 “ the day of delivering it.” A similar *memorandum* or minute is required, by the same act, previous to entering up judgment on a *cognovit actionem*, or warrant of attorney.

An *infant*, or person under the age of twenty-one years, must sue by his *procchein amy*, or next friend <sup>a</sup>, unless where he sues as co-executor with others, in which case it is holden, that the executors of full age may appoint an attorney for themselves and the infant, making together but one representative <sup>b</sup>. And hence, he cannot be an informer upon a penal statute <sup>c</sup>; for by the 18 *Eliz.* c. 5. “ every informer upon a penal statute must exhibit his  
 “ suit *in proper person*, and pursue the same  
 “ only by himself or his attorney.” An infant *defendant* must in all cases appear and defend by guardian, even where he is sued as co-executor with others <sup>d</sup>. And if he appear by attorney, it is error <sup>e</sup>; though if an infant *plaintiff* appear by attorney, it is cured by the statutes of jeofails <sup>f</sup>.

<sup>a</sup> Co. Lit. 135. b. 2  
<sup>1</sup> Inst. 261, 390. F. N. B. 27.

<sup>b</sup> 2 Saund. 212.

<sup>c</sup> Say. Rep. 51.

<sup>d</sup> 2 Str. 784.

<sup>e</sup> 8 Co. 58. b. 9 Co.  
 30. b.

<sup>f</sup> 21 Jac. I. c. 13. 4 &  
 5 Ann. c. 16.

To constitute a *prochein amy* or guardian, the person intended, who is usually some near relation, should come with the infant, before a judge at his chambers; or else a *petition* should be presented to the judge, on behalf of the infant, stating the nature of the action, and, if for the defendant, that he is advised and believes he has a good defence thereto; and praying, in respect of his infancy, that the person intended may be assigned him, as his *prochein amy* or guardian, to prosecute or defend the action. This petition should be accompanied with an *agreement*, signifying the assent of the intended *prochein amy* or guardian, and an *affidavit*, made by some third person, that the petition and agreement were duly signed. On one or other of these grounds, the judge will grant his *fiat*, upon which a rule or order should be drawn up, with the clerk of the rules, for the admission of the *prochein amy* or guardian: which admission is either *special*, to prosecute or defend a *particular* action, or *general*, to prosecute or defend *all* actions whatsoever<sup>g</sup>; though it is said, that, by the practice of this court, a *special* admission of a guardian, to appear in one cause, will serve for others<sup>h</sup>.

The rule or order for the admission of a *prochein amy*, should be obtained before *declara-*

<sup>g</sup> 1 Str. 304.

<sup>h</sup> 1 Str. 305.



tion, and a copy thereof annexed to it; or the defendant is not compellable to plead <sup>i</sup>: and the plaintiff's attorney, if required, must give notice to the defendant's attorney, of the place of abode of the *prochein amy* <sup>k</sup>. In like manner, the rule or order for the admission of a *guardian* should be obtained before *plea*, and a copy of it annexed thereto; for if an infant defendant appear by attorney, though it be in consequence of common process, with a notice requiring him to appear in that manner, the plaintiff may obtain an order for striking out the appearance, and that the defendant appear by guardian, within a certain time, being usually four or six days; or in default thereof, that the plaintiff may be at liberty to name a guardian, to appear and defend for him <sup>l</sup>. And a similar order may be obtained, where the defendant neglects to appear at all <sup>m</sup>.

An infant *plaintiff* is not liable to costs, but only his guardian <sup>n</sup>; and if he refuse to pay them, on demand, he may be proceeded against by attachment <sup>o</sup>. Yet, where an infant plaintiff was taken in execution for costs, the court

<sup>i</sup> Sty. P. R. 264.

<sup>k</sup> 1 Willf. 246.

<sup>l</sup> Barnes, 413, 418.

<sup>m</sup> 2 Str. 1076. 2 Willf. 50.

<sup>n</sup> Cro. El. 33. 1 Str.

548. 2 Str. 708.

<sup>o</sup> Barnes, 128.

refused

refused to discharge him on motion <sup>p</sup>. And it has been adjudged, that costs are payable by an infant *defendant* <sup>q</sup>.

Heretofore, when a writ issued out of this court, it was entered upon a roll; so that though the officer had not returned the writ, yet the defendant might have appeared at the day given by the roll <sup>r</sup>; and that, either to save himself from corporal pain, by imprisonment, or to prevent the loss of issues, or to save his freehold or inheritance <sup>s</sup>. But at this day, the writ is seldom entered upon the roll, except to avoid the statute of limitations.

*Appearance* is the first act of the defendant in court <sup>t</sup>, and differs from *bail*, which is the act of the court itself <sup>u</sup>; as is evident from the language of the bail piece. A *voluntary* appearance is of no effect, unless the plaintiff's attorney, within fourteen days after such appearance, sue out a writ of *latitat*, or bill of Middlesex, where the defendant abides in that county <sup>v</sup>.

In actions by *original*, the appearance is entered with the *filacer* of the county where the

<sup>p</sup> 2 Str. 1217.

<sup>t</sup> Com. Dig. Tit. *Pleader*,

<sup>q</sup> Dyer, 104. 1 Bulst. B. 1.

189. 2 Str. 1217.

<sup>u</sup> 1 Salk. 8.

<sup>r</sup> 1 Salk. 64.

<sup>v</sup> R. T. 4 W. & M. reg. 1.

<sup>s</sup> Co. Lit. 135. a.

action is brought <sup>w</sup>; and upon a summons, attachment, or *distringas*, it should be entered on or before the *quarto die post* of the return of the writ <sup>x</sup>. Upon a *capias*, or other process against the person, it is *common* or *special* <sup>y</sup>; and answers to *common* or *special* bail, which will be treated of in the next chapter.

<sup>w</sup> Trye, *in pref.*

<sup>y</sup> Trye, 67, 68.

<sup>x</sup> *Ante*, 20, 21.

## C H A P. X.

## Of Bail.

**B**AIL, in personal actions, originated with the *capias*<sup>a</sup>; and is common or special. *Common* bail, though necessary to be filed, in order to give the court its jurisdiction, are merely nominal. *Special* bail are two or more<sup>b</sup> real and responsible persons, who undertake, generally or in a sum certain, that if the defendant be convicted, he shall satisfy the plaintiff, or render himself to the custody of the marshal.

Before the making of the statute 12 Geo. I. c. 29. the defendant being always arrested, upon process against his person, it was discretionary in the court, to discharge him upon common, or hold him to special bail<sup>c</sup>. This discretion was exercised by rules, nearly similar to those which now constitute the law of arrest. Anciently, if the cause of action were under *twenty* pounds, the court let the defendant out of custody upon *common* bail; but if it

<sup>a</sup> Gilb. C. P. 33.<sup>b</sup> Lofft, 252.<sup>c</sup> Gilb. K. B. 309. 2 Keb. 101.

were



were above twenty pounds, they made him find *special* bail<sup>d</sup>. Afterwards, the sum was reduced to *ten* pounds<sup>e</sup>. And now, by the last-mentioned statute, “no person shall be holden to special bail, upon any process issuing out of a *superior* court; nor, by 19 G. III. c. 70. upon any process issuing out of an *inferior* court; where the cause of action shall not amount to the sum of *ten* pounds or upwards.” Since the making of these statutes, special or common bail is no longer discretionary in the court, but is governed by the *arrest*; it being a general rule, that wherever the defendant may be arrested, he may be holden to special bail; and *é converso*, that wherever the defendant cannot be arrested, common bail is sufficient.

Common bail may be filed, or a common appearance entered, by the defendant, or his attorney, or by the plaintiff according to the statute<sup>f</sup>. Where the defendant has been served with the copy of an *attachment* of privilege, or of a bill of Middlesex, or other process in trespass, he should file common bail at the return of it, or within *eight* days after such return<sup>g</sup>; which  
are

<sup>d</sup> Gilb. C. P. 35.

see Gilb. K. B. 309.

<sup>e</sup> *Id.* 36.

<sup>g</sup> Stat. 5 G. II. c. 27. § 1.

<sup>f</sup> 12 G. I. c. 29, and for This is the same time as was the origin of common bail, allowed to file common bail, upon

are reckoned exclusively, and Sunday is not accounted as one of them<sup>b</sup>. It should also be filed, wherever the defendant, having been arrested, is discharged upon common bail; and is particularly required in *ejectment*, for the casual ejector<sup>i</sup>, and to authorize judgments by warrant of attorney, default, or *non sum informatus*<sup>k</sup>. Common bail is entered on a piece of stamped parchment, called a bail-piece, and filed with the clerk of the common bails; who, by a late rule<sup>l</sup>, is to mark the bail-pieces *numerically* as they are received. The defendant, having been served with the copy of a *capias*, or other process by *original*, should enter a common appearance, with the *filacer*, in the same number of days as he is allowed to file common bail<sup>m</sup>;

upon an arrest, before the statute 12 G. I. c. 29. And if the defendant did not file it within that time, he was liable to the penalty of five pounds, to be paid to the plaintiff. Stat. 5 W. & M. c. 21. § 3. 9 & 10 W. III. c. 25. § 33. 5 Mod. 392. 1 Cl. Inst. 57. The rule for payment of this penalty was absolute in the first instance; the words of the statutes being, that the

court shall *immediately* award judgment, whereupon the plaintiff may take out execution. 2 Str. 737. Gilb. K. B. 369.

<sup>b</sup> 1 Bur. 56.

<sup>i</sup> R. T. 14 Car. II. R. M. 33 Car. II.

<sup>k</sup> R. H. 1 W. & M. R. T. 4 W. & M. II.

<sup>l</sup> R. E. 30 G. III. 3 T. R. 660.

<sup>m</sup> Stat. 5 G. II. c. 27. § 1. reckon-

reckoning them from the effoin day, and not from the *quarto die post* of the return of the process.

Where an *attorney* of either bench has accepted a warrant, or subscribed a process, declaration, or warrant to appear, the rule is, that "he shall be compelled to cause an appearance, or liable to an attachment, or put out of the roll, as the case requires; and the party is not to be received to countermand such appearance, after his retainer<sup>n</sup>." The usual mode of proceeding upon this rule is by attachment<sup>o</sup>; and if an attorney undertake to appear, the court will oblige him to do it in a proper manner: therefore, if he undertake to appear for an *infant*, he must appear by *guardian*<sup>p</sup>. And though he may have been imposed upon by the sheriff's officer, yet the court will oblige him to fulfil his undertaking<sup>q</sup>.

Before the statute 12 G. I. c. 29. common bail could only have been filed, or a common appearance entered, by the defendant or his attorney. But now, by that statute, as altered by the 5 G. II. c. 27. "If the defendant, having been served with process, shall not appear at the return thereof, or within eight

<sup>n</sup> R. M. 1654. § 10.

<sup>o</sup> 6 Mod. 42, 86.

<sup>p</sup> 1 Str. 114, 445.

<sup>q</sup> *Id.* 693.

"days

“ days after such return, the plaintiff, upon  
 “ affidavit of the service of such process, made  
 “ before a judge, or commissioner of the court  
 “ for taking affidavits, or before the proper  
 “ officer for entering common appearances,  
 “ or his deputy, (and which affidavit shall be  
 “ filed *gratis*,) may enter a common appear-  
 “ ance, or file common bail, for the defendant;  
 “ and proceed thereon, as if such defendant  
 “ had entered his appearance, or filed com-  
 “ mon bail.” Upon these statutes it has been  
 holden, that common bail should be filed, by  
 the plaintiff for the defendant, of the term in  
 which the writ is returnable<sup>1</sup>: for if it be filed  
 of a subsequent term, the cause is out of court.  
 And for the better distinguishing by whom  
 common bail shall have been filed, it is or-  
 dered, that “ in all cases where common bail  
 “ shall be filed by the plaintiff for the defend-  
 “ ant, by virtue of the act, these words shall  
 “ be written on the bail-piece, *viz. filed ac-*  
 “ *cording to the statute*, or words to the like  
 “ effect.” The plaintiff’s attorney may enter a  
 common appearance, or file common bail for  
 the defendant, according to the statute, with-  
 out entering or filing of record the *memoran-*

<sup>1</sup> Caf. Temp. Hardw. 138. 1027. Caf. Temp. Hardw.  
 2 T. R. 719, 720. 207. S. C.

<sup>2</sup> R. M. 10 G. II. 2 Str.



*dum* or minute of his warrant, pursuant to the 25 Geo. III. c. 80<sup>t</sup>. But the defendant's attorney must not plead, or carry on any further proceedings in the action, until such *memorandum* or minute shall have been delivered to the proper officer, to be entered or filed of record, according to the directions of the act<sup>u</sup>.

Where the defendant has been arrested, and discharged out of custody, upon giving bail to the sheriff, for his appearance at the return of the writ, he should regularly appear, by putting in and perfecting *special* bail to the action, or bail *above*; so called, in contradistinction to the sheriff's bail, or bail *below*. And the defendant, in such case, cannot discharge his bail to the sheriff, by surrendering himself before the return of the writ: for it is a settled point, that nothing can be a performance of the condition of the bail bond, but putting in and perfecting bail *above*<sup>v</sup>. Special bail may also be put in by the defendant's attorney, in consequence of his undertaking; or by the sheriff, or his bail<sup>w</sup>, for their own indemnity.

If the defendant be arrested in London or Middlesex, special bail should be put in within *four* days; or, if in any other county, within

<sup>t</sup> See the statute, § 22.

Dalt. Sher. 356.

<sup>u</sup> *Id.* § 23.

<sup>w</sup> 2 Str. 876.

<sup>v</sup> 5 Bur. 2683. and see

*six* days, exclusive, after the return of the process <sup>x</sup>, or *quarto die post* by original. And if either the fourth or sixth day fall on a *Sunday*, the defendant has all the *Monday* following to put in bail <sup>y</sup>.

Before the statute 4 & 5 W. & M. c. 4. § 1. special bail could only have been put in before a judge in town. But, this practice being found productive of great expence and inconvenience, it was enacted, by the above statute, that “the chief justice, and other the justices  
“of the court of king’s bench for the time  
“being, or any two of them, whereof the  
“chief justice for the time being to be one,  
“shall or may, by one or more commission or  
“commissions, under the seal of the said court,  
“from time to time, as need shall require, em-  
“power such and so many persons, other than  
“common attornies and solicitors, as they  
“shall think fit and necessary, in all and every  
“the severall shires and counties within the  
“kingdom of England, dominion of Wales,  
“and town of Berwick upon Tweed, to take  
“and receive all and every such recognizance  
“or recognizances of bail or bails, as any person  
“or persons shall be willing or desirous to ac-

<sup>x</sup> R. M. 8. Ann. I.

<sup>z</sup> Str. 914.

<sup>y</sup> *Id.* (b). 1 Str. 702.

“ knowledge

“ knowledge or make before any of the per-  
“ sons so empowered, in any action or suit de-  
“ pending in the said court, in such manner  
“ and form, and by such recognizance or  
“ bail-piece, as the justices of the said court  
“ have used to take the same: which said re-  
“ cognizance or recognizances of bail or bail-  
“ piece, so taken as aforesaid, shall be trans-  
“ mitted to some or one of the justices of the  
“ said court, where such action or suit shall be  
“ depending; who, upon affidavit made of the  
“ due taking of the recognizance of such bail  
“ or bail-piece, by some credible person pre-  
“ sent at the taking thereof, shall receive the  
“ same, upon payment of the usual fees:  
“ which recognizance of bail or bail-piece, so  
“ taken and transmitted, shall be of the like  
“ effect, as if the same were taken *de bene esse*,  
“ before any of the said justices.”

By the same statute, § 2. “ the justices of the  
“ said court shall make such rules and orders,  
“ for the justifying of such bails, and making  
“ of the same absolute, as to them shall seem  
“ meet; so as the cognizor or cognizers of  
“ such bail or bails be not compelled to ap-  
“ pear in person in the said court, to justify  
“ him or themselves; but the same may and  
“ is hereby directed to be determined by affi-  
“ davit

“davit or affidavits, duly taken before the  
“said commissioners, who are thereby em-  
“powered and required to take the same, and  
“also to examine the sureties upon oath,  
“touching the value of their respective estates;  
“unless the cognizor or cognizers of such bail  
“do live within the cities of London and  
“Westminster, or within ten miles thereof.”

And by the last section, “any judge of assize,  
“in his circuit, shall and may take and receive  
“all and every such recognizance and recogni-  
“zances of bail or bails, as any person shall be  
“willing and desirous to make and acknow-  
“ledge before him; which being transmit-  
“ted in like manner, shall, without oath, be  
“received in manner as aforesaid, upon pay-  
“ment of the usual fees.”

Since the making of the above statute, special bail may be put in, before a judge in town, a commissioner in the country, or judge of assize in his circuit. Before a judge in town, they are put in at his chambers; and in actions by *bill*, their recognizance is taken on a *bail-piece*, made out by the defendant's attorney; stating the term, county, and names of the parties, together with the names and additions of the bail, and the sum sworn to. The recognizance of bail by *bill* is general,



ral<sup>z</sup>, that *if the defendant be condemned in the action, he shall satisfy the costs and condemnation, or render himself to the custody of the marshal; or that they will pay the costs and condemnation for him.* And the bail-piece is left at the judge's chambers, until the bail be perfected.

The ancient course of the court was, that if a man became bail for another upon a *latitat*, &c. in any sum of money, however trifling, he was bail for him, in all actions brought by the same plaintiff, during the same term, were the sums ever so great<sup>a</sup>. To rectify this extraordinary practice, a rule was made, that if the plaintiff should declare against the defendant, upon any bail by him put in, for a *greater* sum than was expressed in the process, upon which the defendant was arrested, then the bail so put in should not be chargeable in that action<sup>b</sup>. Still, however, the bail were liable to all actions, wherein the plaintiff declared for, and recovered a *lesser* sum, than was expressed in the process<sup>c</sup>; and where he declared for, and recovered a *greater* sum, the bail were

<sup>z</sup> 2 Bulst. 232. Cro. Jac. 163. 1 Mod. 16.  
449, 645. Cro. Car. 481. <sup>b</sup> R. T. 22 Car. II. 6  
2 Salk. 564. Mod. 267.

<sup>a</sup> Cro. Jac. 449. 2 Sid. <sup>c</sup> 3 Keb. 16.

totally discharged<sup>d</sup>. At length it was resolved, that as, on the one hand, there was no colour to subject the bail to more than they were bound in, let the plaintiff's demand be ever so much more; so, on the other hand, there was no reason why the plaintiff should suffer by his moderation in taking bail: but the recognizance should be considered as an agreement, to pay to the extent of the sum sworn to, or render the defendant<sup>e</sup>. And, accordingly, it is now settled, that "where the plaintiff declares for or recovers a *greater* sum than is expressed in the process, upon which he declares, the bail shall not be discharged; but be liable for so much as is sworn to, and indorsed on the process, or for any *lesser* sum, which the plaintiff in such action shall recover<sup>f</sup>;" together with the costs of the original action<sup>g</sup>.

In actions by *original*, special bail are put in with the *filacer*, before a judge in town; the defendant's attorney having previously made out, and delivered to him, a note in writ-

<sup>d</sup> 6 Mod. 266. 1 Salk. in the case of *Peterken v. Sampson*, and another, M. 25 102. S. C.

<sup>e</sup> 2 Str. 922.

<sup>f</sup> R. E. 5 G. II. reg. 2. the court, that the bail are liable to pay them, as well as Lofft, 545. Doug. 316.

<sup>g</sup> The rule of E. 5 G. II. the sum sworn to. is silent as to the costs. But

ing, answering to the *bail-piece* by *bill*<sup>h</sup>. The recognizance of bail by *original* is taken in a penalty or sum *certain*, being double the amount of the sum sworn to<sup>i</sup>. But the plaintiff is not entitled to levy equitable costs, out of the penalty of the recognizance<sup>k</sup>.

Before a *commissioner* in the country, the recognizance of bail, whether by *bill* or *original*, is taken on a *bail-piece*<sup>l</sup>, in the same manner as in town, where the action is by *bill*; and an affidavit of the due taking thereof should be made, either before the judge to whom the *bail-piece* is transmitted, or before a commissioner for taking affidavits<sup>m</sup>. In general, it is made before a commissioner, and annexed to the *bail-piece*<sup>n</sup>. But no such affidavit is necessary upon the transmission, where the bail is taken by a judge of assize in his circuit. The rule of court requires the *bail-piece* to be transmitted to the chief justice, or other judge of the court, in *eight* days, if taken within forty miles of London or Westminster, or, if taken above forty miles from London or Westminster, in *fifteen* days,

<sup>h</sup> Trye, 67, 68.

<sup>i</sup> R. T. 8 W. III. *reg.* 3.

<sup>l</sup> *Id.* 121, 122.

§ 1.

<sup>k</sup> 2 Str. 826. 1 Barnardist. K. B. 125. S. C.

<sup>m</sup> *Id.* § 2.

<sup>n</sup> *Id.* (a).

after

after the taking thereof; unless all the judges are on their circuits, and then as soon as any one of them is returned<sup>o</sup>. But it is said, that notwithstanding this rule, the bail-piece must actually be filed with one of the judges on the *sixth* day after the return of the writ, or the bail bond may be assigned<sup>p</sup>. And where the action is by *original*, the bail-piece being transmitted and allowed by the judge, should be filed with the *filacer* of the county where the action is laid<sup>q</sup>.

Special bail are absolute, or *de bene esse*<sup>r</sup>. They cannot be taken *absolutely*, without the consent of the plaintiff, or his attorney<sup>s</sup>; and when they are taken *de bene esse*, the defendant's attorney should give notice thereof in writing, without delay, to the plaintiff's at-

<sup>o</sup> R. T. 8W. III. reg. 3. §3.

<sup>p</sup> Impey, 123.

<sup>q</sup> *Id.* 438. 1 Crompt. 54.

<sup>r</sup> The origin of bail *de bene esse* is thus related by Glyn, Ch. J. "A bishop," says he, "having arrested a man for a large debt, he tendered bail to justice Richardson, who took it in his chamber; and the bail being insufficient, the bishop

"represented the matter to

"parliament, and prayed

"their remedy for it: upon

"which it was enacted, that

"no bail, taken before a

"judge in his chamber,

"should bind the plaintiff,

"without his assent thereto,

"or the confirmation of such

"bail, taken by all the

"court." 2 Sid. 91.

<sup>s</sup> R. M. 1654. f. 7, 8.



torney<sup>t</sup>. The *notice* of bail is either that they are put in, or, if taken before a commissioner, that the bail-piece is *filed*, with an affidavit of the due taking thereof, at a judge's chambers<sup>u</sup>. The notice, in either case, should be properly *entitled*<sup>v</sup>; and, where it is of bail put in, should set forth, with truth and certainty, their names<sup>w</sup>, degrees<sup>x</sup> or mysteries<sup>y</sup>, and places of abode, in order that the plaintiff may have an opportunity of inquiring after them<sup>z</sup>. And the *parish*<sup>a</sup>, or *town*<sup>b</sup>, wherein they live, without the *street*, or other certain place of their residence, is too vague a description. If the bail above are the same persons as were bail to the sheriff, it is usually so expressed in the notice<sup>c</sup>.

The plaintiff or his attorney, upon being served with this notice, either accepts of, or excepts to, the bail. If he *accept* of them, the defendant's attorney should cause the bail-piece to be filed, within twenty days after such acceptance<sup>d</sup>: But if he be not satisfied with the bail, he may *except* to them, and thereby compel a justification. If the bail to the sheriff be-

<sup>t</sup> R. M. 16 Car. II.

<sup>u</sup> Impey, 124.

<sup>v</sup> Lofft, 237.

<sup>w</sup> *Id.* 187.

<sup>x</sup> *Id.* 281.

<sup>y</sup> *Id.* 187.

<sup>z</sup> 6 Mod. 24.

<sup>a</sup> Lofft, 72, 194.

<sup>b</sup> *Per cur.* M. 25 G. III.

<sup>c</sup> Impey, 118.

<sup>d</sup> R. T. 13 Car. II.

come

come bail above, the plaintiff is not at liberty to *except* to them, after he has taken an assignment of the bail bond<sup>e</sup>: for by so doing, he has admitted them to be sufficient. And the delivery of a declaration *in chief* before special bail put in, is holden to be a waiver of the bail; and before justification, it is an acceptance of them<sup>f</sup>. The plaintiff, however, may declare *de bene esse*, or conditionally, provided good bail be put in, or the bail already put in do justify<sup>g</sup>. Though the demand or acceptance of a plea will, even then, be deemed a waiver of the bail, or justification<sup>h</sup>.

The exception to bail should be entered, in the bail-book at the judge's chambers by *bill*<sup>i</sup>, or in the *flacer's* book by *original*<sup>k</sup>, within twenty days after notice of bail put in or filed<sup>l</sup>, and not afterwards<sup>m</sup>. If it be not entered within that time, then, "upon  
" affidavit in writing of such notice, on the  
" back of the bail-piece, for which affidavit  
" no fee shall be taken, the bail shall be

<sup>e</sup> 1 Salk. 97. 7 Mod. 62, 117. 6 Mod. 122. R. M. 8 Ann. Reg. 1 (c.) R. E. 5 G. II. Reg. 1. (a.) Post, 153.  
<sup>f</sup> R. M. 8 Ann. Reg. 1. (c.) R. E. 5 G. II. Reg. 1. (a.)  
<sup>g</sup> R. M. 8 Ann. Reg. 1. (c.)  
<sup>h</sup> Barnes, 92.  
<sup>i</sup> R. M. 8 Ann. Reg. 2.  
<sup>k</sup> R. E. 2 G. II.  
<sup>l</sup> R. M. 16 Car. II. R. T. 8 W. III. Reg. 3. § 5.  
<sup>m</sup> 1 Salk. 98. 6 Mod. 24.  
<sup>n</sup> R. M. 8 Ann. Reg. 2.

“ filed, by the defendant’s attorney, within  
 “ four days next after the end of the twenty  
 “ days ”. ” The exception being entered, *notice*  
 thereof should be given in writing, without de-  
 lay, to the defendant’s attorney<sup>o</sup>: and “ if the  
 “ *notice* be given in term time, the defendant  
 “ shall procure his bail to justify in four days  
 “ *exclusive* after such notice; or shall add  
 “ other bail, who shall justify within the said  
 “ four days; but if such exception be enter-  
 “ ed in vacation, and notice thereof given in  
 “ like manner, the bail put in, or other addi-  
 “ tional bail, shall justify upon the first day of  
 “ the subsequent term<sup>p</sup>. ”

Where the bail already put in do not mean to justify, others should be *added*<sup>q</sup>, before a judge, on the bail piece by *bill*, or in the filacer’s book by *original*, within the time allowed for their justification: and if there be not time enough, the defendant’s attorney may take out a summons, and obtain an order for further time<sup>r</sup>. When other bail are added, the court will order the names of those who were excepted to, and did not justify, to be struck out of the bail-

<sup>p</sup> R. M. 16 Car. II.

<sup>p</sup> R. E. 5 G. II. Reg. 1.

<sup>o</sup> R. M. 8 Ann. Reg. 2.

<sup>q</sup> Impey, 119, 120.

(a.) R. E. 2 G. II. R. E.  
 5 G. II. Reg. 1.

<sup>r</sup> 1 Crompt. 64, 65, 88,  
 &c.

piece,

piece<sup>s</sup>. But until this be done, they are liable to be proceeded against<sup>t</sup>. And if it be not done, until after proceedings have been had against them, they must pay the costs of such proceedings<sup>u</sup>.

The justification of bail is either in *person* or by *affidavit*. Where the bail are put in before a judge in town, whether by bill or original, they must *personally* appear in *court*, which for this purpose is holden at serjeant's inn-hall; or, by consent<sup>v</sup>, before a *judge* at his chambers; and, in order to justify themselves, must swear that they are housekeepers, and respectively worth double the sum sworn to, after all their debts are paid, or exclusive of all debts or demands, due from them to any person or persons whatsoever<sup>w</sup>. Bail put in before a commissioner must justify themselves in the same manner, where they live in *London* or *Westminster*, or within ten miles thereof<sup>x</sup>. But where they live at a greater distance, they may be justified, without their

<sup>s</sup> Say, Rep. 58. 1 Will.  
337 S. C.

<sup>t</sup> Say, Rep. 308, 9.

<sup>u</sup> 1 Blac. Rep. 462. 4  
Bur. 2107.

6 Mod. 24. R. E. 5 G.  
II, 1. (b).

<sup>w</sup> R. T. 8 W. III. Reg. 3.

§ 5. (c). R. E. 5 G. II.  
Reg. 1. (b).

<sup>x</sup> Stat. 4 & 5 W. & M.  
c. 4. § 2.

personal



personal attendance, by *affidavit*, duly taken before the commissioner, of their being housekeepers, &c.<sup>y</sup> This affidavit is usually annexed to the bail-piece, and a copy of it delivered to the plaintiff's attorney, at the time of giving him notice of the bail-piece being filed; after which, if an exception be entered, which seldom happens, the affidavit must be produced, and read in court, as a justification, upon notice given thereof, and an affidavit of the service of such notice<sup>z</sup>.

The *notice* of justification should set forth, that the bail already put in will, on a certain day, justify themselves in open court, or that others will be added, and justify themselves, as good bail for the defendant<sup>a</sup>. And if the bail were put in before a commissioner, the notice should express that they will justify themselves *by affidavit*<sup>b</sup>. Notice of justification by *three* bail has been holden good<sup>c</sup>; but notice that A. B. and C. or *two* of them will justify, is irregular<sup>c</sup>. Where the bail already put in intend to justify, *one* day's previous notice of justification, or notice for the

<sup>y</sup> *Id.* R. T. 8 W. III.

*Reg.* III. § 5. R. E. 5 G.

II. *Reg.* I. (*b*).

<sup>z</sup> *Impey*, 124, 5.

<sup>a</sup> *Id.* 119, &c.

<sup>b</sup> *Id.* 125.

<sup>c</sup> *Lofft*, 26.

next day, is deemed sufficient<sup>d</sup>; unless Sunday intervene, and then notice must be given on *Saturday* for *Monday*. But where other bail are added to those already put in, there must be *two* days previous notice of justification, one *inclusive* and the other *exclusive*, as *Monday* for *Wednesday*, &c.<sup>e</sup> And *Sunday* is not reckoned as a day for this purpose: therefore notice of added bail on *Saturday* for *Monday* is not sufficient<sup>f</sup>.

When the bail are to be justified in court, an *affidavit* must be made of the service of notice of justification; and delivered to counsel, with instructions for him to move to justify them<sup>g</sup>. If they are not present at the sitting of the court, they must wait till it is rising<sup>h</sup>: and the judge's clerk attending with the *bail-piece*, or the *filacer* with his bail-book, they are allowed to justify, as a matter of course; unless they are *opposed* by counsel, *viva voce*, or, if taken before a commissioner, upon cross affidavits.

The following are among the various grounds of opposing bail: *first*, that there is some de-

<sup>d</sup> Impey, 119.

M. 26 G. III. Impey, 125,

<sup>e</sup> *Id. ibid.* Per cur. M. 21 6.

G. III.

<sup>g</sup> Impey, 121.

<sup>f</sup> Case of *Overton's* bail,

<sup>h</sup> Lofft, 88.

fect in the *form*, or irregularity in the *service*, of the notice of bail or justification<sup>i</sup>. *Secondly*, That they have assumed names that are either *feigned*, or belong to other persons. If they assume *feigned* names, the court will order them, and the attorney, to be set on the pillory<sup>k</sup>. And “if any person shall acknowledge, or procure to be acknowledged, any recognizance or bail, in the name of another person, not privy or consenting to the same<sup>l</sup>; or, before a commissioner, shall represent or *personate* another person, whereby he may be liable to the payment of any debt or damages<sup>m</sup>; he shall, on conviction, suffer death as a felon, without benefit of clergy.” But the court will not vacate the proceedings against the party personated, until the offender be convicted<sup>n</sup>; nor can a conviction take place, until the bail-piece be filed<sup>o</sup>. A *third* ground of opposing bail is, that they are not *house-keepers*: If they be, the rent of their houses is immaterial, though under ten pounds<sup>p</sup>; nor is it necessary that they should have been assessed to the poor’s rate<sup>q</sup>. *Fourthly*, they may be

<sup>i</sup> *Ante*, 134, 138.

<sup>k</sup> 1 Str. 384.

<sup>l</sup> Stat. 21. Jac. I. c. 26.

§ 2.

<sup>m</sup> Stat. 4 & 5 W. & M.

c. 4. § 4.

<sup>n</sup> T. Jon. 64. 1 Ventr.

301. 3 Keb. 694. 1 Ld.

Raym. 445.

<sup>o</sup> 2 Sid. 90.

<sup>p</sup> Lofft, 148.

<sup>q</sup> *Id.* 328.

opposed

opposed on the ground of their not being worth double the sum sworn to, after payment of all their debts. Under this head may be ranked *bankrupts*, who have not obtained their certificates; or such as have been twice bankrupts, and not paid fifteen shillings in the pound<sup>r</sup>. And bail have been rejected, who did not know the defendant<sup>s</sup>, or had been bail before, but did not know in how many actions, or for what sums<sup>t</sup>. But it seems, that the circumstance of not knowing the defendant, being only a mark of suspicion, may be explained away. If they forswear themselves, they are liable to the punishment of wilful and corrupt perjury<sup>u</sup>. *Fifthly*, *Foreigners* are not admitted to be bail, merely in respect of property *abroad*, which is not liable to the process of this court<sup>v</sup>. Though it has been said, that merely having no property in *England* is not of itself a sufficient objection, without other auxiliary circumstances<sup>w</sup>. *Sixthly*, it is a general rule, that “no attorney of this” or any other court shall be bail, in any action or suit depending in this court<sup>x</sup>.”

<sup>r</sup> *Mountain v. Wilkins*, M.  
21 G. III.

<sup>s</sup> *Per cur.* M. 26 G. III.

<sup>t</sup> Lofft, 72, 194.

<sup>u</sup> Cro. Car. 146.

<sup>v</sup> 4 Bur. 2526, 7. Lofft,  
34, 147.

<sup>w</sup> 1 Blac. Rep. 444. and  
see 2 Blac. Rep. 1323, 4.

<sup>x</sup> R. M. 1654. § 1. R. M.  
14 G. II. Reg. 1.

This



This rule, which was calculated for the benefit of attornies, has been extended to their *clerks*<sup>y</sup>. And it is also a rule, founded on principles of prudent jealousy, that “no sheriff’s officer, “bailiff, or other person concerned in the execution of process, be permitted to be bail, “in any action or suit depending in this “court<sup>z</sup>.” This latter rule has been applied to the keeper of the *poultry* compters<sup>a</sup>, and *marshalsea* court officers<sup>b</sup>. But if a person who, by the rules of the court, is not permitted to become bail, be put into the bail-piece, and not excepted to, the plaintiff cannot take an assignment of the bail bond, and proceed upon it, as if no bail had been put in<sup>c</sup>. *Lastly*, the court will not permit a justification of bail, after the expiration of the rule to bring in the body<sup>d</sup>.

Where the bail do not attend, or are not permitted to justify, on account of a defect in the notice of bail or justification, the court will, in general, allow them further time

<sup>y</sup> Cowp. 828. Doug. 450.  
S. C.

<sup>z</sup> R. M. 14 G. II. Reg. 2.  
2 Str. 890. 1 Barnardist. K.  
B. 417. Lofft, 153. 2 Blac.  
Rep. 799.

<sup>a</sup> Doug. 450.

<sup>b</sup> *Per cur.* T. 18 G. III.

<sup>c</sup> *Thomson v. Roubell*, E.  
22 G. III. cited in Doug. 550.

<sup>d</sup> Lofft, 438. *Highway*  
and *Tyers*, M. 20 G. III.  
Case of *Overton's* bail, M. 26  
G. III. Impey, 125, 6. K. B.  
*Thorold v. Fidler*, E. 28 G.  
III. C. B. *semb. contra.*

to justify<sup>e</sup>. But where they are rejected, on account of some personal insufficiency, the court will seldom allow further time to add and justify others<sup>f</sup>. And if the bail do not justify at the time appointed, and no further time is given, they are out of court<sup>g</sup>.

When the bail are *allowed*, a rule or order of allowance should be drawn up, with the clerk of the rules, and a copy of it served on the plaintiff's attorney: after which, the bail-piece should be obtained from the judge's chambers, and filed with the master. In filing the bail, it should be observed, that every bail taken on or before the continuance day, is a bail, and to be filed of the *preceding* term; and every bail taken after the continuance day is a bail, and to be filed of the *subsequent* term<sup>h</sup>: but where new bail are added to other bail taken on or before the continuance day, the new bail shall be taken and filed as of that term, in which the first bail was put in<sup>i</sup>.

Such are the means of putting in and perfecting bail above, where the defendant is *at large*, in order to prevent an assignment of the

<sup>e</sup> Lofft, 72, 187. *Per cur.* *b.* And as to the *continuance* day, see R. E. 11 W. III. M. 25 G. III.

<sup>f</sup> *Per cur.* T. 24 G. III. Reg. 2. 2 Str. 1215.

<sup>g</sup> 1 Crompt. 66.7 Mod. 50. <sup>i</sup> R. E. 5 G. II. Reg. 1.

<sup>h</sup> R. E. 5 G. II. Reg. 1. *b.* 1 Salk. 100. *semb. contra.*

bail-bond, or proceedings against the sheriff. Bail above may also be put in and perfected, at any time pending the action, where the defendant is in *custody* of the sheriff or marshal. But the bail in such case must justify themselves in open court, if the plaintiff require it, before the defendant is entitled to his discharge<sup>k</sup>. So that, if they be put in at the beginning of a long vacation, and the plaintiff except to them, and will not consent to a justification at chambers, the defendant must lie in prison till the next term. A practice that seems to stand in need of some regulation!

Before we dismiss the subject of bail, it will be proper to notice, when, and in what manner, they may be discharged, by the *render* of their principal, &c.

*Prior* to the return of the writ in the original action, the defendant, not being delivered by the court into the custody of his bail, cannot render himself, or be rendered, in their discharge<sup>l</sup>. But *subsequent* to the return of it, he may render himself, or be rendered, in their discharge, either before or after judgment<sup>m</sup>, at any time before the rising of the court, on the return day of the second *scire facias*, or of the

<sup>k</sup> R. M. 1654. § 7.

<sup>m</sup> 1 Str. 198.

<sup>l</sup> Barnes, 88, 9.

first, where a *scire feci* is returned, by *bill* <sup>n</sup>; or by *original*, at any time before the rising of the court, on the appearance day, or *quarto die post* of the return of the second *scire facias* <sup>o</sup>, or of the first, where a *scire feci* is returned <sup>p</sup>, and not after <sup>q</sup>. And there is no occasion for the bail to justify, in order to render, even after they are excepted to; unless the sheriff has been ruled to bring in the body <sup>r</sup>. It was anciently the course of the court, not to allow a render, after the return of *non est inventus* to a *capias ad satisfaciendum* <sup>s</sup>. But a great mischief resulted from this practice; for the plaintiff would sue out a *capias*, returnable the next day, so that the bail had little or no time to bring in the body <sup>t</sup>: to remedy which, the judges indulged the bail so far as to permit them to render the body, upon the return of the first *scire facias*, if the *capias* were returnable *de die in diem* <sup>u</sup>; but if it were returnable the next term, the bail were strictly holden to

<sup>n</sup> 1 Ld. Raym. 157. 6 Mod. 238. 8 Mod. 340. <sup>r</sup> *Ashton v. King*, and another, M. 21 G. III. Barnes, R. T. 1 Ann. II. (a). R. E. 111, 117. 2 Blac. Rep. 5 G. 2. III. (a). 758, 1179, 80.  
<sup>o</sup> 1 Willf. 270. <sup>s</sup> Cro. El. 738.  
<sup>p</sup> 4 Bur. 2134. <sup>t</sup> 1 Ld. Raym. 157.  
<sup>q</sup> 3 Bur. 1360. 1 Blac. <sup>u</sup> Cro. El. 618.  
Rep. 393. S. C.

L

render



render the principal, by the return of it<sup>v</sup>. *Popham*, ch. J. extended this indulgence still farther; and permitted the bail to render, any time before the return of the second *scire facias*, or upon the return, *sedente curia*<sup>w</sup>. This practice, however, appears to have been disallowed by lord *Coke*<sup>x</sup>. But it was soon after revived by *Croke*, ch. J.<sup>y</sup> and is now fully established.

If the plaintiff proceed by action of *debt* on the recognizance, the render may be made by the space of *eight* intire days, in full term, next after the return of the *latitat*, or other process against the bail<sup>z</sup>. And where an action was commenced, and afterwards discontinued, and then the bail rendered the principal, before the bringing of a new action, the court held the render to be good, it being before the return of the process in this suit; and that it was the fault of the plaintiff, not to begin right at first<sup>a</sup>.

Before the return of the *capias ad satisfaciendum*, the render is a matter of right, and may be pleaded<sup>b</sup>. But afterwards it is allowed, by the grace and favour of the court<sup>c</sup>, and not *ex*

<sup>v</sup> Cro. El. 738.

<sup>w</sup> Cro. Jac. 109.

<sup>x</sup> Moor, 850. 3 Bulst.

182. S. C.

<sup>y</sup> W. Jon. 139. Sty. Rep.

324. 8 Mod. 32.

<sup>z</sup> R. T. 1 Ann. reg. 1.

1 Salk. 101. 1 Ld. Raym.

721. 6 Mod. 132.

<sup>a</sup> 2 Str. 915.

<sup>b</sup> 1 Ld. Raym. 156, 7.

<sup>c</sup> R. T. 1 Ann. reg. 2. (a).

*debito*

*debito justitiæ*; for the condition of the recognizance is broken, upon the return of *non est inventus* to the *capias*. And therefore a subsequent render cannot be pleaded<sup>d</sup>; though, if made in time, the bail may be relieved by motion. If the bail, at any time after the return of the *capias*, render the principal at a judge's chambers; and he is committed to the tipstaff, from whom he escapes or is rescued, that will not be a good render<sup>e</sup>; for the court will not suffer the plaintiff to be prejudiced, by their indulgence to the bail.

Where the defendant is *at large*<sup>f</sup>, he may come and render himself, or be taken and rendered by his bail, either in *court*, if sitting, or before a *judge* at his chambers; and the court or judge will make an entry, or minute of the render<sup>g</sup> and commitment, and cause the defendant to be sent therewith, in custody of a tipstaff, to the king's bench prison. But where the defendant is already a *prisoner*, he must be brought up by writ of *habeas corpus cum causâ*, which may be made returnable *immediatè*<sup>h</sup>, and upon this writ, the court will either re-

<sup>d</sup> *Keeley and Medley, M.*

<sup>f</sup> 6 Mod. 231.

24 G. III. Barnes, 106, 7.

<sup>g</sup> R. T. 3 Ann.

<sup>e</sup> 6 Mod. 238. R. T. 1 Ann.

<sup>h</sup> 3 Bur. 1875.

reg. 2. (a).

mand the defendant to his former custody, or commit him, as a prisoner of the court, to the custody of the marshal. Under every commitment, should be entered the state of the cause, at the time of the render: if before declaration, *the sum sworn to* on the arrest; but if after declaration, these words should be added, *declaration filed or delivered, issue, or interlocutory judgment signed*, as the case is. If after final judgment in debt, *the debt and damages*; in other cases, *the quantum of the damages*<sup>1</sup>.

Where the defendant is in custody on a *criminal* account, the court will remand him to his former custody<sup>k</sup>. And where an impressed man, not being liable to be taken out of the king's service, by any process, other than for some *criminal* matter, was brought up by the keeper of the Savoy, to be surrendered in discharge of his bail, the court first committed him to the custody of the marshal, and then ordered him to be delivered *instante* to the keeper of the Savoy; which was done, and an *exoneretur* entered on the bail-piece<sup>l</sup>. In general, however, the court will commit the defendant, as their prisoner, to the custody of the marshal; and that, though he were previously

R. E. 8 G. III.

Bur. 2034.

<sup>k</sup> 2 Str. 1217. But see 4<sup>l</sup> 1 Bur. 339.

charged

charged in another custody, upon an *extent* or *information*, or for a *contempt* in not paying the king's debt; so as the civil action appears to have been commenced before the other proceedings, and the court are satisfied that it is for a just debt, and the application really made by the bail: for by the 25 Ed. III. c. 13. "the king's debtors shall not be protected from the proceedings of their other creditors against them<sup>m</sup>." The attorney general, however, may have a *habeas corpus* to remand them<sup>n</sup>.

If the defendant had become *bankrupt*, and obtained his certificate, before the bail were fixed, the method formerly was, for the bail to surrender him; and then for the defendant to apply to be discharged, upon an affidavit, stating his having become bankrupt, since the cause of action arose, and obtained a certificate of his conformity to the commission<sup>o</sup>. But of late, where a bankrupt is clearly entitled to his discharge, the court, to avoid circuitry, have ordered an *exoneretur* to be entered on the bail-piece, without the form of a regular surrender by his bail<sup>p</sup>.

The defendant being rendered, *notice* thereof should be given, without delay, to the plain-

<sup>m</sup> 1 Salk. 353. 1 Str. <sup>n</sup> 1 Willf. 248.

641. 1 Willf. 248. 1 Bur. <sup>o</sup> Cowp. 824.

339.

<sup>p</sup> *Id. ibid.*



tiff's attorney, and an *affidavit* made of the service of such notice <sup>q</sup>; to the end that the plaintiff, if he think proper, may charge the defendant in execution, or at least that he may not be at any further trouble or expence, in proceeding against the bail. If the plaintiff therefore, through want of notice, continue to proceed against the bail, though this will not vitiate the render, yet they shall not be relieved, until they have paid the charges <sup>r</sup>. But the notice need not be given before the rising of the court, on the day of the render <sup>s</sup>.

The next step to be taken, in order to discharge the bail, is to enter an *exoneretur* on the bail-piece <sup>t</sup>; to effect which, the bail-piece should be obtained from the judge's chambers, and a certificate <sup>u</sup> from the prison, that the defendant is in custody: these being carried to the master, he will enter an *exoneretur* on the bail-piece, which should then be filed; for if the bail-piece be filed, without an *exoneretur*, the bail remain liable, though the defendant be actually in prison <sup>v</sup>. Yet, where the bail-

<sup>q</sup> R. T. 1 Ann. reg. 2. 6

Mod. 238. 8 Mod. 281.

<sup>4</sup> Bac. Abr. 420, 421.

<sup>r</sup> *Id. ibid.*

<sup>s</sup> *Per. Cur. H.* 26 G. III. 282.

<sup>t</sup> Impey, 410.

<sup>u</sup> R. T. 3 Ann. (a).

<sup>v</sup> R. T. 1 Ann. reg. 2.

(a.) 1 Salk. 98. 8 Mod.

piece has been previously delivered out to be filed, to the plaintiff's attorney, who neglects to file it, he cannot proceed against the bail, for want of an *exoneretur* <sup>w</sup>. And where the render is in other respects regular, the court will order an *exoneretur* to be entered on the bail-piece, upon paying the costs that have accrued, subsequent to the render <sup>x</sup>.

The only remaining circumstance necessary for discharging the bail, is to make an entry of the render in the marshal's book, kept in the king's bench office <sup>y</sup>; it being holden, that until such entry be made, the defendant is not in custody, so as to charge the marshal, in an action of escape <sup>z</sup>.

If the plaintiff declare against the defendant, for a different cause of action from what is expressed in the process, or, by *original*, in a different county from that where the action is brought <sup>a</sup>, his bail are discharged; and they are also discharged, where the defendant is made a peer of the realm <sup>b</sup>, or member of the

<sup>w</sup> 8 Mod. 280. Barnes,  
68. S. P.

<sup>x</sup> Say Rep. 7, 8. 1 Bur.  
409.

<sup>y</sup> R. T. 3 Ann. (a).

<sup>z</sup> 1 Salk. 272, 3; 2 Str. 1215,  
1226. 2 Bur. 1049.

<sup>a</sup> 3 Lev. 235. R. E. 2  
G. II. (a).

<sup>b</sup> Doug. 45.

house of commons <sup>c</sup>, or becomes bankrupt and obtains his certificate <sup>d</sup>, &c. at any time pending the action: And in any of these cases, the court, on motion, will order an *exoneretur* to be entered on the bail-piece.

<sup>c</sup> *Langridge one &c. v. Flood*, <sup>d</sup> 1 Bur. 244, 5. 436,  
Esq. H. 26 G. III. Cowp. 824.

## C H A P. XI.

## Of the Proceedings upon the Bail-bond.

**I**F bail above be not put in and perfected in due time, the bail-bond is forfeited; and the plaintiff may either take an assignment of it, or proceed against the sheriff, for not bringing in the body <sup>a</sup>. If the plaintiff, however, be dissatisfied with the bail-below, he should not take an assignment of the bail-bond; for by so doing, he not only discharges the sheriff <sup>b</sup>, but if the same bail be put in above, he cannot afterwards except against them <sup>c</sup>.

Before the statute for the amendment of the law <sup>d</sup>, the sheriff was not compellable to assign the bail-bond <sup>e</sup>; though if he had not assigned it, the court would have amerced him <sup>f</sup>: and the old way was, first to give a rule for the she-

<sup>a</sup> Gilb. C. P. 20.

G. II. *reg.* 2. C. B. *contra.*

<sup>b</sup> *Id.* 21. 1 Salk. 99. 1 Will.  
223. *Williams and Jacques,*

<sup>d</sup> 4 & 5 Ann. c. 16. §  
20.

M. 24 G. III.

<sup>e</sup> 1 Mod. 228.

<sup>f</sup> *Ante*, 135. R. M. 6

<sup>f</sup> 1 Sid. 23. 2 Mod. 84.

riff



riff to bring in the body, before the plaintiff could take an assignment of the bail-bond<sup>c</sup>. Another mischief, at common law, was, that after an assignment of the bail-bond, the action thereupon must have been brought in the name of the sheriff, who might have released it, and thereby driven the plaintiff into a court of equity<sup>d</sup>. To remedy these inconveniences it was enacted, by the above statute, “ that  
 “ if any person or persons shall be arrested, by  
 “ any writ, bill, or process, issuing out of any  
 “ of the courts of record at Westminster, at  
 “ the suit of any common person, and the sheriff or other officer take bail from such person, against whom such writ, bill, or process is taken out, the sheriff or other officer, at the request and costs of the plaintiff in such action or suit, or his lawful attorney, shall assign to the plaintiff in such action the bail-bond, or other security taken from such bail, by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses, which may be done without any stamp; provided the assignment so indorsed be duly stamped, before any action be brought thereupon: and  
 “ if the said bail-bond or assignment, or other

<sup>c</sup> 1 Salk. 99.

<sup>d</sup> Gilb. C. P. 21.

“ security

“ security taken for bail be forfeited, the plain-  
 “ tiff in such action, after such assignment made,  
 “ may bring an action and suit thereupon in  
 “ his own name: and the court where the ac-  
 “ tion is brought, may, by rule or rules of the  
 “ same court, give such relief to the plain-  
 “ tiff and defendant in the original action, and  
 “ to the bail, upon the said bond, or other se-  
 “ curity taken from such bail, as is agreeable  
 “ to justice and reason; and that such rule or  
 “ rules of the said court shall have the nature  
 “ and effect of a defeazance to such bail-bond,  
 “ or other security for bail.”

Upon this statute, it has been said, the bail-  
 bond may be assigned *before* it is forfeited, though  
 it cannot be put in suit till afterwards <sup>i</sup>. And  
 where the defendant has neglected to put in and  
 perfect bail above, the plaintiff is not out of court,  
 by omitting to declare in the original action,  
 within two terms after the return of the writ;  
 but he may still take an assignment of the bail-  
 bond <sup>k</sup>; for he is not bound to declare *de bene*  
*esse*, within the time limited for the defend-  
 ant's appearance, and after that time he can-  
 not declare, until the defendant have actually  
 appeared.

<sup>i</sup> Barnes, 77.

G. III. 2 Blac. Rep. 876.

<sup>k</sup> 2 Str. 1262. *Carmi-*  
*chael v. Troutbeck*, T. 24 C. B. *contra*.

The assignment may be made by the high-sheriff, or by the under-sheriff in *his* name; but not by the under-sheriff's clerk <sup>1</sup>. And as the assignment may be made, so the action may be brought, in any county <sup>m</sup>. But it must necessarily be brought in the *same* court, from whence the process issued, on which the bail-bond was taken <sup>n</sup>: otherwise the parties could not have the relief intended by the statute.

The proceedings on the bail-bond may be *set aside*, if irregular; or *stayed*, if regular, upon terms, in order that there may be a trial in the original action. But the court will not order the bail-bond to be delivered up to be cancelled, on the ground of a misnomer <sup>o</sup>.

Where the plaintiff has not lost a trial, the court, or a judge, will stay the proceedings on the bail-bond, upon putting in and *perfecting* bail above; paying the costs incurred by the assignment of the bail-bond, to be taxed by the master; receiving a declaration in the original action; pleading issuably, and taking short notice of trial, so that the cause may be tried the same term <sup>p</sup>. And wherever the defendant is

<sup>1</sup> 1 Str. 60. 10 Mod. 288. Rep. 838. S. C.

<sup>m</sup> 2 Str. 727. 2 Ld. <sup>o</sup> 3 T. R. 572.

Raym. 1455. S. C.

<sup>p</sup> R. M. 8 Ann. reg. 1. (c).

<sup>n</sup> 1 Bur. 642. 3 Bur. Cowp. 71.

1923. 3 Willf. 348. 2 Blac.

guilty

guilty of a neglect, in not putting in bail in due time, by which the bail-bond becomes forfeited, the notice (in case the party means to put in bail, in order to stay proceedings upon the bail-bond), should be, that he will put in and *perfect* bail on such a day; when the plaintiff may oppose them in court, without its being a waiver of the bail-bond<sup>a</sup>. But if the plaintiff have lost a trial, the court will further require, that the bail consent that judgment be entered against them on the bail-bond, for the plaintiff's security<sup>r</sup>; after which, they are liable to immediate execution, if the defendant should fail in the action, and they cannot discharge themselves by a surrender.

The sheriff's bail are liable to pay what is really due to the plaintiff, though beyond the sum sworn to and costs, to the full extent of the penalty of the bond<sup>s</sup>; and the court will not relieve them, upon the *death* of the defendant in the original action, where the plaintiff might have had judgment against him, if bail above had been put in and perfected in

<sup>a</sup> Cowp. 769.

G. III.

<sup>r</sup> R. M. 8 Ann. reg.

<sup>s</sup> *Savage v. West*, 9 G.

1. (c). 2 Str. 1262. *Carmichael v. Troutbeck*, T. 24

III. cited in Cowp. 71. K. B. H. Blac. 76. C. B.

time.



time <sup>t</sup>. But where the defendant dies, before the plaintiff could have had judgment against him, if there had been no delay in putting in and perfecting bail, the court will stay the proceedings, upon payment of costs only <sup>u</sup>.

<sup>t</sup> R. M. 8 Ann. reg. 1.      <sup>u</sup> Cowp. 71. Barnes, 61,  
(c). Gilb. K. B. 362. Cowp. 70.  
71. Barnes, 112.

## C H A P. XII.

Of the Proceedings against the Sheriff, to compel him to return the Writ, and bring in the Body.

**I**F the plaintiff be dissatisfied with the bail taken by the sheriff, he should rule him to return the writ <sup>a</sup>. But this rule cannot be had after the plaintiff has taken an assignment of the bail bond <sup>b</sup>; nor where the writ was executed by a *special* bailiff, nominated by the plaintiff or his agent <sup>c</sup>.

The rule to return the writ is a *four* day rule in *London* and *Middlesex* <sup>d</sup>, and a *six* day rule in any other city or county <sup>e</sup>. It is obtained from the clerk of the rules; and usually taken out on the return day of the writ by *bill*, or *quarto die post* by *original*, in order that it may keep pace with the time to put in bail. But it cannot regularly be taken out *before*, though dated *on* the return day <sup>f</sup>. And by

<sup>a</sup> Gilb. C. P. 21. R. M. 6 G. II. (a).

<sup>b</sup> *Ante*, 135, 153.

<sup>c</sup> 2 Blac. Rep. 952.

<sup>d</sup> R. T. 6 G. III. 4 Bur. 1921.

<sup>e</sup> R. M. 6 G. II.

<sup>f</sup> 1 T. R. 552.

statute

statute 20 Geo. II. c. 37. § 2. "no sheriff shall  
 "be liable to be called upon to make a re-  
 "turn of any writ or process, unless he be re-  
 "quired so to do, within *six* months after the  
 "expiration of his office." Upon which sta-  
 tute it has been holden, in case of sheriffs, that  
 the months are *lunar* months<sup>z</sup>; that the day of  
 the sheriff's quitting his office is to be reckoned  
 as one<sup>z</sup>; and that the sheriff cannot be ruled to  
 return the writ, after the expiration of six  
 months, though requested before<sup>h</sup>.

The rule to return the writ, being intend-  
 ed to bring the sheriff into contempt, must  
 be *personally* served on the sheriff himself,  
 or his under-sheriff; and, except in *Lon-*  
*don, Middlesex, and Surrey*, service on the  
 under-sheriff's agent in town is not deemed  
 sufficient<sup>i</sup>: For, as six days only are allow-  
 ed to return the writ, it might otherwise be im-  
 possible to obey the rule, in distant counties.

The sheriff, being ruled to return the writ,  
 either does, or does not return it. If there be no  
 return, it is a contempt of the court; for which,  
 the constant course of proceeding is by *attach-*  
*ment*, whether against the present or late sheriff<sup>k</sup>.  
 For, as to the late sheriff, he ought in strictness  
 to have returned the writ, before he was out of

<sup>z</sup> Doug. 446.

<sup>h</sup> 2 T. R. 1.

<sup>i</sup> Doug. 404.

<sup>k</sup> R. M. 6 G. II.

office,

office, and therefore the contempt was actually committed, whilst he was a servant of the court<sup>1</sup>. But the sheriff is not liable to an attachment, before the expiration of the time allowed for putting in and perfecting bail: and therefore, if the rule to return the writ expire (as it generally does,) during that time, the plaintiff, instead of moving for an attachment, must proceed as though the sheriff had duly returned it.

The common return to a *capias* is *non est inventus*, or *cepi corpus et paratum habeo*. If the sheriff return *non est inventus*, where he has, or might have, taken the defendant, he is liable to an action for a false return; and he is liable to a similar action, if he return *cepi corpus et paratum habeo*, where he has taken the defendant, and let him go at large, without bail<sup>m</sup>. But where he has taken bail, he is not liable to an action<sup>n</sup>. Still, however, he may be *amerced*, upon the latter return, for not

<sup>1</sup> Doug. 447. 439. 1 Ventr. 55, 85. 2  
<sup>m</sup> Gilb. C. P. 22. Noy, Saund. 60, 154. 1 Mod.  
 39. 1 Mod. 228. 2 Mod. 33, 57, 227. 2 Mod. 83,  
 178. S. C. 177. 3 Salk. 314, 15. *Ante*,  
<sup>n</sup> Cro. El. 624, 808, 852. 108, 9.  
 Noy, 39. S. C. 1 Sid. 22,



bringing in the body, or putting in and perfecting bail above °.

The mode of proceeding against the *present* sheriff, upon a return of *cepi corpus et paratum habeo*, in order to compel him to bring in the body, or put in and perfect bail above, is by rule of court; but against the *late* sheriff, it is by *distringas* <sup>p</sup>.

The rule to bring in the body is a *four* or a *six* day rule <sup>q</sup>, and should be served in like manner as the rule to return the writ. It is usually taken out on the expiration of the rule to return the writ; and though the writ be returned, it cannot be taken out pending the time allowed for putting in bail <sup>r</sup>. But where the writ, in a *country* cause, was returnable on the *first* of June, and the sheriff was ruled to return it on the *second*, and on the *eighth* he returned *cepi corpus*, upon which the plaintiff, on the *same* day, served him with a rule to bring in the body, and on the *fifteenth* obtained an attachment, the court held the proceedings to be regular; although it was objected, that the sheriff had all the *eighth* to return the writ,

° See the cases referred to in <sup>q</sup> R. M: 6 G. II. R. T. the last note. R. M. 6 G. II. (a). 6 G. III. 3 Bur. 1921.

<sup>r</sup> 1 Willf. 262. H. Blac. 233, 4. <sup>r</sup> *Spicer* against *Linnell*, E.

<sup>p</sup> 2 Lil. P. R. 510. 5 Bur. 23 G. III. Impey, 136. 2726.

and

and consequently, that the rule to bring in the body should not have been served till the *ninth*<sup>o</sup>: for in this case, the time for putting in bail had expired, before the service of the rule to bring in the body.

The *distingas* against the *late* sheriff is a judicial writ, issuing out of the king's bench office by *bill*, or *filacer's* office by *original*, and directed to the *present* sheriff. In point of form, it is *general* or *special*; and should be made returnable on a day *certain*, or *general* return, according to the former proceedings<sup>t</sup>. This writ should lie four days *exclusive* in the sheriff's office; but need not be left there *before* the return, it being deemed sufficient to leave it *on* the return day<sup>u</sup>.

Where bail above is put in, and notice thereof given to the plaintiff's attorney, the bail should be excepted to, and notice of the exception given to the defendant's attorney, before the sheriff is called upon to bring in the body<sup>v</sup>. But where bail above is not put in, at the time of calling upon the sheriff, he must put in and perfect it, at his peril, without an exception<sup>w</sup>.

<sup>t</sup> *Parker and Wall, M.*  
26 G. III.

<sup>c</sup> *Impey, 134, 5. Trye,*  
144, 5.

<sup>u</sup> *Per Cur. H. 23 G. III.*

<sup>v</sup> *Lofft, 159.*

<sup>w</sup> *Per Cur. E. 24 G. III.*

When the sheriff is called upon to bring in the body, he must either bring it into court, or put in and perfect bail above, within the time allowed him by the *rule* or *distringas*<sup>x</sup>: otherwise it is a contempt, for which he is liable to pay the debt and costs; and in order to enforce the payment, the plaintiff, on a proper affidavit, may move the court for an *attachment*, or sue out an *alias distringas*.

The *attachment* is a criminal process, and lies against the *present* or *late* sheriff, for not returning the writ; but for not bringing in the body, it lies against the *present* sheriff only. Against the *present* sheriff, it is directed to the *coroner*; against the *late* one, to his successor. And it must be made returnable at a *general* return, though the original process was at a day *certain*<sup>y</sup>. The attachment may be moved for on the *last* day of term<sup>z</sup>; and until it issues, the proceedings are on the *civil* side of the court, and must be entitled with the names of the parties: But as soon as the attachment issues, the proceedings are on the *crown* side, and from that time the king is to be named as the prosecutor<sup>a</sup>.

Upon issuing the attachment, the sheriff, usually pays the amount of the debt and costs;

<sup>x</sup> 1 Will. 262. R. M. 6  
G. II. (a).

<sup>y</sup> 1 Str. 624.

<sup>z</sup> 1 Bur. 651.

<sup>a</sup> 3 T. R. 133, 253.

and is reimbursed by his officer, who either puts the bail-bond in suit, if any was taken, in the sheriff's name; or, if no bail-bond was taken, brings an action against the defendant, in his own name, for money paid <sup>b</sup>. Upon the first *distringas*, the sheriff, to whom it is directed, only levies *issues* to the amount of forty shillings, which the plaintiff should move to increase; and if the debt be small, the court will order the whole of it to be levied, with costs, upon the *alias distringas*: but otherwise the plaintiff should move again to increase the issues, and sue out a *pluries distringas*, &c. And when issues are returned to the amount of the debt and costs, the plaintiff should move for a sale of them, under the 10 Geo. III. c. 50<sup>c</sup>; the mode of proceeding by *distringas*, against the late sheriff, being similar to that against peers, and members of the house of commons <sup>d</sup>. If the sheriff or coroner, being called upon by rule, neglect to return the *attachment* or *distringas*, he may be attached himself; and the attachment against

<sup>b</sup> But see the case of *Rogers* for money paid, where no bail-bond was taken upon the arrest? *v. Reeves*, 1 T. R. 418. And *quære* whether, according to that case, the sheriff or his officer can maintain an action against the defendant,

<sup>c</sup> Impey, 134, 5.

<sup>d</sup> *Ante*, 19.



the *coroner*, should be directed to *elisors* named by the master<sup>c</sup>.

When the sheriff is fixed for a contempt, he is absolutely liable to the payment of the debt and costs; and cannot be relieved on the ground of the defendant's death, after the contempt was incurred, and before the attachment issued<sup>f</sup>. But the sheriff, standing in the same situation as the bail above, is only liable to the payment of the sum sworn to, together with the costs<sup>g</sup>. And it seems, that if he should come to purge the contempt, it would be competent for the court to moderate the punishment, and not impose a fine to the amount of the whole debt; though, in order to proportion it to the actual damages, they should be ascertained by a jury<sup>h</sup>. It is also settled, that when the sheriff is once fixed, the court will not permit a justification of bail<sup>i</sup>. But where the defendant has merits, they will, sometimes, let him in to a trial of them, upon terms; and in the mean time, stay the proceedings upon the attachment<sup>k</sup>.

<sup>c</sup> Impey, 137. 1 Crompt. 233. C. B. *contra*.  
86.

<sup>h</sup> Doug. 447.

<sup>f</sup> 3 T. R. 133.

<sup>i</sup> *Ante*, 142.

<sup>g</sup> *Stackey* against *Peel*, E.

<sup>k</sup> Doug. 447.

25 G. III. K. B. H. Blac,

## C H A P. XIII.

## Of the Writ of Habeas Corpus.

HAVING thus far carried on the proceedings in a personal action, when the defendant is *at large*, I shall now consider him as a *prisoner*; and, in the present chapter, shall treat of the writ of *habeas corpus*, as it is used in *civil* cases, to bring the defendant into the custody of the marshal, or, consequentially, to remove causes against him from inferior courts.

The writ of *habeas corpus*, in *civil* cases, is a judicial writ, issuing out of the king's bench office<sup>a</sup>, commanding the sheriff, or other officer to whom it is directed, to have the body of the defendant, together with the day and cause of taking and detaining him, before the court, or a judge, on a day *certain* in term time, or *immediat *, to *answer* or *satisfy* the plaintiff, or, generally, to *do* and *receive* what the court or judge shall consider of him. Hence it is called, according to the subject-matter, a writ of *habeas corpus ad respondendum*, *ad satisfaciendum*, or *ad faciendum et recipiendum*<sup>b</sup>; though

<sup>a</sup> 2 Bur. 777.*Thes. brev.* 131.<sup>b</sup> *Off. brev.* 110, 112.

the latter is more commonly called a *habeas corpus cum causâ*. And it is grantable of common right, at all times, whether in term or vacation, without any motion in court <sup>c</sup>.

The writ of *habeas corpus cum causâ*, emphatically stiled *the writ of liberty* <sup>d</sup>, lies for the defendant to remove himself, or for the plaintiff to remove him from the custody of the sheriff, or other officer by whom he was arrested, into the custody of the marshal. At common law, when a defendant was arrested, and detained or charged in custody of the sheriff or other officer, for want of bail, upon mesne process, if the plaintiff did not, within two terms, cause him to be brought up, by writ of *habeas corpus cum causâ*, and committed, so that he might declare against him in the custody of the marshal, the defendant was entitled to his discharge, on common bail or appearance <sup>e</sup>. This mode of proceeding was altered by the statute 4 & 5 W. and M. c. 21. which enables the plaintiff to declare against the defendant in custody of the sheriff, or other officer who arrested him <sup>f</sup>. He is still at liberty, however, to remove the defendant

<sup>c</sup> 1 Lev. 1. 2 Mod. 306. (a). 1 Wils. 120. 2 Bur.

<sup>d</sup> Gilb. Repl. 116. 1051. 1 T. R. 192.

<sup>e</sup> R. M. 1654. § 11. R. <sup>f</sup> Vide post, chap. XVI.

E. 5 W. & M. Reg. III. § 1.

by

by writ of *habeas corpus cum causâ*, from the custody of the sheriff or other officer, into the custody of the marshal, at any time before or after judgment<sup>g</sup>. This writ also lies for the *bail* of the defendant to bring him up, and surrender him in their discharge; and under it, we have seen<sup>h</sup>, the court will either remand the defendant to his former custody, or commit him to the custody of the marshal. The writ of *habeas corpus cum causâ* should be directed to the sheriff, or other officer, in whose custody the defendant is detained; and there is an old rule<sup>i</sup>, directing it to be made returnable in court, at a day certain in term, unless directed to the sheriffs of London or Middlesex, or unless it be to deliver over the defendant in discharge of his bail. But this rule having fallen into disuse, the writ is now made returnable before the chief-justice at his chambers, *immediatê*; and should be returned in due and convenient time<sup>k</sup>.

When the defendant, being charged with process issuing out of this court, is removed *before* declaration, from the custody of the sheriff or marshal, to the *Fleet* prison, the plaintiff cannot proceed further here; but must either

<sup>g</sup> 1 Salk. 354. 2 Str. 1262.  
Say. Rep. 154. 3 Bur. 1875.

<sup>h</sup> *Ante*, 147, 8.

<sup>i</sup> R. M. 1654. § 7.

<sup>k</sup> 3 Bur. 1875, 6.

declare



declare against him in the *common pleas*, or remove him into the custody of the marshal, by writ of *habeas corpus ad respondendum*, in order to charge him with a declaration<sup>1</sup>. This writ also lies for a *third* person, to remove a defendant from the *Fleet*, or prison of an *inferior* court, in order to charge him with a declaration in this court<sup>m</sup>. But then, there must be something to charge him with, either in the body of the *habeas corpus* or return, or ready in court upon bringing him up<sup>n</sup>. The writ of *habeas corpus ad respondendum* should be directed to the *warden* of the *Fleet*, or keeper of an *inferior* prison, returnable at a day certain in court; and will be as good cause of detainer, as a writ of *capias ad respondendum*<sup>o</sup>. But this writ does not lie for the plaintiff in an *inferior* court, to remove the body of the defendant into this court, to answer to a new action here, for the same debt<sup>p</sup>.

When the defendant is removed *after* declaration, from the custody of the sheriff or marshal, to the *Fleet* prison, the plaintiff should pro-

<sup>1</sup> Barnes, 384, 5, 402. 936. 2 Bur. 1049.

<sup>m</sup> 3 Bac. Abr. 2. 2 Lil. <sup>n</sup> 2 Lil. P. R. 356.

P. R. 4. Sty. P. R. 330. <sup>o</sup> R. M. 1654. § 7.

<sup>1</sup> Mod. 235. 2 Mod. 198. <sup>p</sup> Cowp. 116.

S. C. 1 Salk. 351. 2 Str.

ceed to judgment against him in this court, and then remove him into the custody of the marshal, by writ of *habeas corpus ad satisfaciendum*, in order to charge him in execution<sup>9</sup>. This writ should be directed and returnable, in the same manner as the writ of *habeas corpus ad respondendum*; and the number of the judgment-roll indorsed thereon, by the attorney who sues it out<sup>r</sup>.

Under one or other of these writs, a defendant may cause himself to be removed, from any *civil* custody, into that of the marshal. If he be already in custody of the *sheriff*, under the process of *this* court, he has only to sue out a writ of *habeas corpus cum causa*; under which he will be removed, as a matter of course, on paying the usual fees: and he may be removed, in like manner, from the prison of an *inferior* court. But if he be in custody of the *sheriff*, under the process of the *common pleas* or *exchequer*, he must procure aailable writ to be taken out against him in this court, and lodged in the *sheriff's* office, as a foundation for his commitment on the *habeas corpus*. Where he is in custody of the *warden* of the *Fleet*, he may be removed, in

<sup>9</sup> 1 Sid. 100. R. T. 2    <sup>r</sup> R. M. 1654. § 7. R. G. 1. (b.) 2 Str. 1153. T. 2 G. 1. (b).

Barnes, 385.

*term* time, by writ of *habeas corpus ad respondendum*; upon which he must be charged in court, with a declaration in aailable action: in *vacation*, aailable writ must be taken out against him, and bail above put in thereon, in this court; and then a writ of *habeas corpus cum causâ* must be brought, in order to surrender him in discharge of his bail. A prisoner removed into the custody of the marshal, by writ of *habeas corpus ad respondendum*, cannot be removed elsewhere, till he has answered to the cause here<sup>s</sup>. And it is a general rule, applicable to all writs of *habeas corpus*, that  
 “ every prisoner, who, by virtue thereof, shall  
 “ be committed to the custody of the marshal,  
 “ shall remain there for *two* days next after  
 “ such commitment, notwithstanding any  
 “ other writ of *habeas corpus* to the said mar-  
 “ shall delivered and allowed<sup>t</sup>.”

When a defendant, against whom there is a cause depending in an *inferior* court, is removed by *habeas corpus* into the court of king's bench, the inferior court have lost their jurisdiction over him; and not having jurisdiction over his person, they cannot proceed in the cause, the bail in the inferior court are discharged, and the plaintiff must declare *de*

<sup>s</sup> 1 Salk. 350.

<sup>t</sup> R. H. 5 W. & M.

*novo* <sup>u</sup>. Hence, the writ of *habeas corpus* is the common method of removing causes from inferior courts <sup>v</sup>.

It was formerly usual for the defendant in an inferior court to sue out a writ of *habeas corpus*, and keep it in his pocket, without producing it, till issue was joined, the jury sworn, and the plaintiff had given his evidence; by which means the plaintiff was not only put to a considerable expence, but the defendant, knowing before-hand what proofs he could produce, had an opportunity of opposing them by false witnesses <sup>w</sup>. To remedy this mischief, it was enacted, by the statute 43 Eliz. c. 5. that “no writ of *habeas corpus*, or other writ, “to remove any cause depending in an inferior court, having jurisdiction thereof, shall “be received or allowed by the judges or officers of such court, but they may proceed “therein, as if no such writ were sued forth “or delivered, except the said writ be delivered to such judges or officers, before the “jury have appeared, and one of them is “sworn.” And, still further to avoid vexatious delays, by the removal of causes out of inferior courts, it was enacted, by the statute

<sup>u</sup> Skin. 244, 5.

<sup>v</sup> 3 Bac. Abr. 15.

<sup>w</sup> See the preamble to the statute 43 Eliz. c. 5.



21 Jac. 1. c. 23. § 2. " that no writ of *habeas corpus*, *certiorari*, or other writ, except writs  
 " of error or attaint, to stay or remove any  
 " cause, depending in an inferior court of record, having jurisdiction thereof, where the  
 " same arises within its jurisdiction, shall be  
 " received or allowed by the judges or officers  
 " of such court, but they may proceed therein,  
 " &c. except the said writ be delivered to such  
 " judges or officers, before *issue* or *demurrer*  
 " joined in the said cause; so as the same be  
 " not joined within six weeks next after the arrest or appearance of the defendant." This statute is confined to inferior courts of record, and does not extend to the case of an interlocutory judgment. Therefore the practice, in that case, is to allow the *habeas corpus*, in like manner as upon the 43 *Eliz.* provided it be delivered at any time before the jury are sworn<sup>\*</sup>: which is also the practice, where issue is joined within six weeks next after the defendant's arrest or appearance.

By the last-mentioned statute, it is further provided, that " if in any cause, not concerning freehold or inheritance, or title of land,  
 " lease or rent, commenced or depending in  
 " any such inferior court of record, it shall ap-

<sup>\*</sup> 2 Bur. 759, 1152. But see Pr. Reg. 217. Barnes 221. S. C. *contra*.

" pear,

“pear, or be laid in the declaration, that the  
 “debt, damages, or things demanded, do not  
 “amount to the sum of *five* pounds, then such  
 “cause shall not be stayed or removed, by any  
 “writ or writs whatsoever, other than writs of  
 “error or attain<sup>y</sup>.” Soon after the making of  
 this statute, a method was contrived, of re-  
 moving causes for *less* than five pounds, by set-  
 ting up an action for a fictitious demand, of  
 five pounds or upwards; and then, upon suing  
 out a *habeas corpus*, all the causes were remo-  
 ved together<sup>z</sup>. To defeat this contrivance, it  
 was enacted, by a subsequent statute<sup>a</sup>, that  
 “the judges of such inferior courts, as are de-  
 “scribed in the statute of *James*, may proceed  
 “in such causes as are therein specified, which  
 “appear or are laid not to exceed the sum of  
 “*five* pounds, although there may be other ac-  
 “tions against the defendant, wherein the  
 “plaintiff’s demands may exceed the sum of  
 “five pounds.” And lastly, by the statute 19  
 Geo. III. c. 70. § 6. which takes away the  
 arrest under ten pounds in inferior courts, it is  
 provided, that “no cause, where the cause of  
 “action shall not amount to the sum of ten  
 “pounds or upwards, shall be removed or re-  
 “moveable into any superior court, by any

<sup>y</sup> 21 Jac. I. c. 23. § 4.

<sup>a</sup> 12 G. I. c. 29. § 3.

<sup>z</sup> Palm. 403.

“ writ

“ writ of *habeas corpus* or otherwise, unless  
 “ the defendant shall enter into a recognizance  
 “ to the plaintiff, in the inferior court, with  
 “ two sufficient sureties, in double the sum due,  
 “ for the payment of the debt and costs, in case  
 “ judgment shall pass against him.”

The writ of *habeas corpus*, we are now speaking of, when directed to the inferior courts of London, Westminster, Southwark, and other courts within five miles of London, may be returnable *immediatē*; but otherwise it must be returnable on a day certain, in court <sup>b</sup>. And if it be duly and regularly issued, and delivered to the judges of an inferior court, it instantly suspends their power; insomuch that if they afterwards proceed, they are liable to an attachment, and their proceedings are void and *coram non judice* <sup>c</sup>. In such case, therefore, the writ should be forthwith received and allowed: nor can the officer refuse to obey it, under pretence of not being paid his *fees* in the court below, or the *charges* of bringing up the defendant <sup>d</sup>: For the former, he has a proper remedy by action; and for the latter, if not paid, the defendant may be remanded <sup>e</sup>.

<sup>b</sup> R. M. 1654. f. 3.

352. 6 Mod. 177. S. C.

<sup>c</sup> Cro. Car. 201. 1 Mod.

<sup>d</sup> 2 Str. 814. 2 Bur. 1152.

195. T. Jon. 209. 3 Mod.

<sup>e</sup> 1 Str. 308. 2 Str. 1262.

85. Skin. 244. 1 Salk. 148,

If the writ of *habeas corpus* be delivered after issue or demurrer joined<sup>f</sup>, unless it be joined in six weeks after the defendant's arrest or appearance, or in a cause for less than *five* pounds, or if the damages be under *ten* pounds, and no recognizance entered into pursuant to the 19 Geo. III. c. 70.<sup>g</sup>, "the judges of the inferior court may disallow and refuse the same; and proceed as if no such writ had been granted or sued forth: provided there be an utter-barrister, of three years standing, at the bar of one of the four inns of court, steward or under-steward, town-clerk, judge, or recorder of such inferior court, or assistant to the judge or judges of the same, who is not an utter-barrister of that standing, there present, and not of counsel in any action or suit there depending<sup>h</sup>." If this proviso be not complied with, the cause may be removed at any time<sup>i</sup>: and the court will not grant a *procedendo*, where the judge is a barrister, if he be not present at the trial<sup>k</sup>.

When the writ is received and *allowed*, the body of the defendant must be returned, with the causes of taking and detaining him; or the

<sup>f</sup> 21 Jac. I. c. 23. § 5.

<sup>i</sup> Cro. Car. 79. 3 Mod.

<sup>g</sup> § 6. 2 Cromp. 419, 20. 85.

<sup>h</sup> 21 Jac. I. c. 23. § 6.

<sup>k</sup> 1 Bur. 514.



officer will be liable to an *attachment*. And it is not sufficient to return, that before the coming of the writ, the party was bailed; for he is still in custody, in contemplation of law<sup>1</sup>. And even where the writ is *disallowed*, for any of the causes beforementioned, it must be returned to the court, with the *special matter*<sup>m</sup>.

On the return of the writ, if the defendant be in actual custody, on *mesne* process, the court will not discharge him, till bail be put in and perfected *above*<sup>n</sup>: and therefore, in such case, the better way of gaining the defendant his liberty, is to put in and perfect bail *below*, before the bringing of the *habeas corpus*<sup>o</sup>. If it be returned, upon the *habeas corpus*, that the defendant is condemned by judgment, he shall be remanded, and continue in prison, without being let to bail, against the will of the plaintiffs; until agreement be made with them of the sums adjudged<sup>p</sup>. In the latter case, therefore, if the defendant mean to be turned over to the king's bench prison, it is usual for him to have a friendly action brought against him in the court *below*; which being

<sup>1</sup> *Salmon v. Slade*, H. 25,      <sup>n</sup> R. M. 1654. § 7. R. H.  
26 Car. II. 2 Crompt. 419.      <sup>2</sup> Jac. II. (a).

<sup>m</sup> 1 Mod. 195.      <sup>3</sup> Mod.      <sup>o</sup> New-Guide, K. B. 244.  
85. Carth. 59.      <sup>2</sup> Crompt.      <sup>p</sup> Stat. 2 Hen. V. stat. I.  
419, 20.      c. 2. Year-book, 9 Hen. VI. 8.

returned,

returned, will be a cause of detainer in the court *above*.

When the defendant is not in actual custody, upon the return of the *habeas corpus*, he must put in bail, if called upon, in the court *above*; which bail is either *common* or *special*, as in the court *below*. Before the statute 12 Geo. I. c. 29. every defendant, not being an executor or administrator, must have put in special bail upon a *habeas corpus*, in all actions whatsoever, except actions for words and trifling assaults, unless a judge had otherwise ordered<sup>1</sup>. By that statute, "no person shall be holden to *special* bail, upon process issuing out of an inferior court, where the cause of action shall not amount to the sum of *forty shillings* or upwards." And it has been since declared, by a subsequent statute<sup>2</sup>, that "no person shall be arrested, or holden to *special* bail, upon such process, where the cause of action shall not amount to the sum of *ten pounds* or upwards." Therefore, at this day, unless there be a cause of action to that amount, the defendant need not put in *special* bail, upon a *habeas corpus*, in the court *above*: though if it be under that amount, he must enter into a recognizance, with two sureties, to the plaintiff, in the court *below*.

<sup>1</sup> R. M. 1654. § 9. R. H.    <sup>2</sup> 19 Geo. III. c. 70.

<sup>2</sup> Jac. II.

At the return of the writ, the plaintiff may have a rule for a *procedendo*, unless the defendant put in bail, within *four* days after notice of the rule, if in *term*; if in *vacation*, then a rule or warrant for a *procedendo*, unless good bail be put in, within *six* days after notice thereof\*. But the defendant cannot put in bail *before* the return of the writ†: and even afterwards, he is not obliged to do so, unless called upon by rule‡.

The bail upon a *habeas corpus* are taken on a *bail-piece*, setting forth that the defendant is delivered to bail upon a *habeas corpus*, at the suit of the plaintiff or plaintiffs *in the plaint*⁴; in which respect, it differs from the bail-piece upon a *cepi corpus*. The bail-piece is usually annexed to the *habeas corpus* and return; it being a rule⁵, that “no bail shall be taken upon a *habeas corpus*, by any justice of this court, unless the writ, with the return thereof, shall be offered before the said justice to be filed, at the time of putting it in.” Where *common* bail are sufficient, the bail-piece should be filled up, annexed to the

\* R. H. 10 W. III. (a).

But see R. M. 1654. § 8.

† R. M. 1651. R. E. 29  
Car. II R. H. 10 W. III.

⁴ R. T. 8 W. III. Reg.  
3. § 1.

‡ New-Guide, K. B. 249.

⁵ R. H. 10 W. III.

*habeas corpus* and return, and filed, by the defendant's attorney, at a judge's chambers, within the time allowed by the rule <sup>x</sup>. Where *special* bail are required, they may be put in, at any time pending the rule, before a judge in town, commissioner in the country, or judge of assize in his circuit <sup>y</sup>: and they are either *absolute* or *de bene esse*, as upon a *cepi corpus* <sup>z</sup>.

The bail in such case are liable to all the actions mentioned in the return of the *habeas corpus*, wherein the plaintiff or plaintiffs shall declare within two terms <sup>a</sup>. But this must be understood of the bail upon a *habeas corpus*, before declaration: for it is said, that if the plaintiff have declared, before the *habeas corpus* delivered, in one action which requires *special* bail, and in another wherein *common* bail is sufficient, the bail shall be *special*, only as to that action which requires special bail, and *common* to the other <sup>b</sup>. But special bail are liable on a removal *after* declaration, though the plaintiff declare in a *different* kind of action, in the court above, so as it be for the *same* cause <sup>c</sup>.

<sup>x</sup> New-Guide, K. B. 250, *Ante*, 133.

251.

<sup>a</sup> R. H. 2 Jac. II. (a).

<sup>y</sup> R. T. 8 W. III. Reg. III.

<sup>b</sup> *Serle v. Newton*, H. 25,

§ 1.

26 Car. II. 2 Cromp. 428.

<sup>z</sup> R. M. 1654. § 7, 8.

<sup>c</sup> 1 Will. 277.



When special bail are put in, upon a *habeas corpus*, notice thereof should be given in writing, before the expiration of the rule, to the plaintiff's attorney; who is allowed *twenty-eight* days after they are put in, to except to them: and if he do not except to them for insufficiency, within that time, the bail-piece should be filed, by the defendant's attorney, within *four* days next after the end of the *twenty-eight* days<sup>d</sup>. If the bail in an inferior court offer to become bail in the action here, the plaintiff is, in general, compellable to take them; because he might, but did not except to them below. But it is otherwise, where a cause comes hither out of *London*; for the sufficiency of the bail *there* is at the peril of the clerk, and he is responsible to the plaintiff; so that the plaintiff had not the liberty of excepting to them: and the clerk is not responsible, if they be deficient, in this court, though he was in *London*<sup>e</sup>.

If the plaintiff except against the bail, he may have a rule or warrant for a *procedendo*, unless they are perfected in *four* days, after service of the rule<sup>f</sup>: and thereupon the *same*

<sup>d</sup> R. M. 1654. § 8. R. M.

16 Car. II. and note (*b*).

<sup>1</sup> Salk. 98.

<sup>e</sup> 1 Salk. 97.

<sup>f</sup> R. M. 16 Car. II. (*c*).

or *different* bail must justify, (as in other cases) within the four days, if the rule be served in *term*; but if served in *vacation*, it is sufficient for the defendant to give notice, within the time allowed by the rule, of an intended justification, on the first day of the ensuing term<sup>z</sup>.

If bail be not put in and perfected in due time, a *procedendo* may be awarded<sup>h</sup>; which is a writ, directed to the judge of the inferior court, commanding him to proceed in the cause. The *procedendo* removes the suspension created by the *habeas corpus*; and a cause, once remanded thereby, cannot afterwards be removed or stayed before judgment<sup>i</sup>. This writ may also be awarded, where it appears upon the return of the *habeas corpus*, that the court *above* cannot administer the same justice to the parties as the court *below*. As where an action is brought in *London*, for calling a woman *whore*<sup>k</sup>; or upon a custom or bye-law, which is only sueable there<sup>l</sup>. But, except in causes removed from *London*, the court will not enter into the validity of a bye-law, in a summary way, on the return of the *habeas corpus*; but put the parties to declare upon it, and demur<sup>m</sup>.

<sup>z</sup> New-Guide, K. B. 249.

<sup>k</sup> 2 Rol. Abr. 69. Carth. 75.

<sup>h</sup> R. M. 1654. § 8.

<sup>l</sup> 2 Bur. 777, 8. 2 Blac.

<sup>i</sup> Stat. 21 Jac. I. c. 23. rep. 1060.

§ 3.

<sup>m</sup> 2 Bur. 775.

Where a *habeas corpus* is brought, after interlocutory and before final judgment, in an inferior court, and the defendant dies before the return of it, a *procedendo* shall be awarded: because, by the 8 & 9 W. 3. c. 11. the plaintiff may have a *scire facias* against the executors, and proceed to judgment, which he cannot have in another court; and by this means he would be deprived of the effect of his judgment, which would be unreasonable<sup>n</sup>. So where an action was brought in the sheriff's court of *London* against two partners, and one of them brought a *habeas corpus*, and put in bail for himself only, a *procedendo* was granted: for otherwise the plaintiff would have been disabled from going on, in either court<sup>o</sup>.

The record itself is never removed by a *habeas corpus*, as it is on a *certiorari*, but remains below; and the return is only an account or history of their proceedings, stated and sent up to the superior court, to judge and determine the matter there: therefore if a cause be removed hither, by *habeas corpus*, the plaintiff here must begin *de novo*, and declare against the defendant as in custody of the marshal<sup>p</sup>.

<sup>n</sup> 1 Salk. 352.

<sup>o</sup> 1 Str. 527.

<sup>p</sup> 1 Salk. 352. and see Skin. 245.

6 Mod. 177. 1 T. R. 372.

Upon

Upon a *habeas corpus*, the plaintiff must declare, if at all, before the end of the *second* term after putting in bail, including the term in which it was put in<sup>a</sup>. If he do not declare within that time, the defendant's attorney is not bound to accept a declaration<sup>a</sup>; though the plaintiff cannot be *nonpros'd* for want of it<sup>r</sup>. Upon a *recordari facias loquelam*, however, by which both parties have a day in court, if the plaintiff do not appear, the defendant may sign a judgment of *nonpros*, and is entitled to costs<sup>s</sup>.

<sup>a</sup> 1 Str. 631. Barnes, 90. bail put in.  
 But see Cro. Jac. 620. by <sup>r</sup> R. M. 16 Car. II. 7c).  
 which it appears, that an- Cowp. 117. 1 T. R. 372.  
 ciently the plaintiff had <sup>s</sup> 1 T. R. 371.  
 three terms to declare after



## C H A P. XIV.

Of the Bill against Prisoners, in the actual or supposed Custody of the Marshal; and how far it is considered as the Commencement of the Suit.

**W**HEN a defendant is committed to the custody of the marshal<sup>a</sup>, or has put in bail upon a *cepi corpus*<sup>b</sup>, or *habeas corpus*<sup>c</sup>, the plaintiff, or any other person, may exhibit a bill, and declare against him, as a prisoner of the court, in whatever action, and charge him with whatever injury he thinks proper<sup>d</sup>.

Where the defendant is in actual custody, he has the privilege of the court, and cannot be compelled to answer elsewhere; therefore if he were not to answer here, none could have remedy against him<sup>e</sup>. And even where he is not in actual custody, yet still, when he ap-

<sup>a</sup> 7 Hen. VI. 42. 27 Hen. VI. 6. a. 2 Inst. 23. 4 Inst. 72. 2 Bulst. 207, 8.

<sup>b</sup> 31 Hen. VI. 10. 32 Hen. VI. 4. 21 Hen. VII. 33. Hob. 264, 5. Cro. Jac. 450. Godb. 339. Cro. Car. 330.

<sup>c</sup> Cro. Jac. 620. 1 Salk. 352.

<sup>d</sup> R. E. 15 G. II. Cowp.

455.

<sup>e</sup> 2 Bulst. 123. Carth. 378. 1 Salk. 1, 2. S. C.

2 Bur. 1051. 1 T. R. 592.

pears

pears and puts in bail, he is *supposed* to be in custody of the marshal, and may be proceeded against accordingly<sup>b</sup>. But an appearance alone, without bail, is not sufficient<sup>f</sup>; it being clearly settled, that where the defendant is not in actual custody, no action can be legally commenced against him as a prisoner, until he has filed bail<sup>g</sup>. It is the entry of bail in such case which gives this court jurisdiction<sup>h</sup>: and therefore where no bail is entered for the defendant<sup>i</sup>, or where bail is entered for him by a wrong name<sup>k</sup>, or there are several defendants, and no bail is entered for one of them<sup>l</sup>, the proceedings are void, and *coram non judice*. But it is said, that by the practice of this court, though the defendant's bail be not taken and entered till the last day of term, and the bill be put in before, any time that term, it is well enough; yet, from the time of the bail, the defendant is answerable as in custody of the marshal, and not before, in strictness of law<sup>m</sup>.

<sup>f</sup> 7 Hen. VI. 41. Cro. El. 605.

<sup>g</sup> 1 Sid. 373. 2 Keb. 368. S. C. 1 Vent. 135. 2 Lev.

13. 2 Keb. 790. S. C.

<sup>h</sup> 1 Vent. 135.

<sup>i</sup> Cro. El. 605. Moor, 694. Cro. Jac. 620.

<sup>k</sup> Cro. El. 223.

<sup>l</sup> Poph. 145.

<sup>m</sup> Hob. 70. Cro. Jac. 384. Jenk. 295. S. C.

The bill against a prisoner is a complaint in writing, and, except where the action is brought for a *trespass* committed in *Middlesex*<sup>n</sup>, should alledge the defendant to be in custody of the marshal. Where the defendant is in actual custody, the bill should be filed, on treble-penny stamped parchment, with the clerk of the declarations, in the king's-bench office, before a copy of it is delivered to the defendant, or left for him with the gaoler or turnkey<sup>o</sup>. But a declaration against a defendant at large upon *bail* is good, although a bill have not been filed; because, if the bringing of a writ of error, or any other reason, make the filing of a bill necessary, it may be filed at any time<sup>p</sup>.

Where the defendant is in the actual or supposed custody of the marshal, upon a bill of *Middlesex* or *latitat*, &c. the *bill*, exhibited against him as a prisoner of the court, is considered as the commencement of the suit, and the bill of *Middlesex* or *latitat*, &c. merely as process to bring him into court<sup>q</sup>. Such process, therefore, may be sued out, though the

<sup>n</sup> Dyer, 118. (a).

<sup>q</sup> 1 Will. 40, 144, &c.

<sup>o</sup> R. E. 5 W. & M. III.

2 Bur. 960. But see 3 Bur.

§ 1. (b). 8 Mod. 226, 7.

1244.

<sup>p</sup> Say. Rep. 49.

defendant

defendant ought not to be arrested upon it, before the cause of action<sup>r</sup>; and the plaintiff is allowed to give in evidence a cause of action, arising after it is sued out, and before the exhibiting of the bill<sup>s</sup>. It has been frequently ruled, however, that, for certain purposes, a bill of *Middlesex* or *latitat*, out of this court, may be taken to be in nature of an original writ, in the *common pleas*<sup>t</sup>; and a *latitat*, even without a bill of *Middlesex*, if properly issued, and continued on the roll, has been holden to be a good commencement of the suit, to avoid a plea of the statute of limitations<sup>u</sup>, or a *tender* made after suing it out<sup>v</sup>. It was indeed said by *Holt*, ch. J. that “ there “ is a difference between a civil action, and “ an action given by a statute; for in the first “ case, the suing out a *latitat* within the time, “ and continuing it afterwards, will be sufficient; but in the other case, if the party “ proceed by bill, he ought to file his bill “ within time, that it may appear to be upon

<sup>r</sup> Cro. El. 271. Cro. Jac. 1 Sid. 53, 60. 2 Ld. Raym. 561. 1 Ventr. 28. 8 Mod. 880. 1 Str. 550. 2 Str. 736. 343. 1 Wilf. 142. 2 Bur. 2 Ld. Raym. 1441. S. C. 967. Doug. 62. 2 Bur. 961.

<sup>s</sup> Cowp. 454.

<sup>t</sup> *Id.* 456.

<sup>u</sup> Sty. Rep. 156, 178.

<sup>v</sup> Cro. Car. 264. 1 Wilf.

141.

“ the



"the record itself"<sup>w</sup> : " But upon a writ of error, all the judges in the exchequer chamber held, that a *latitat* is a kind of original in the king's bench<sup>x</sup>. And accordingly, in two subsequent cases<sup>y</sup>, it was holden to be a good commencement of the suit in a penal action. Hence it appears, that a *latitat* may be considered, either as the commencement of the action, or only as process to bring the defendant into court, at the *election* of the plaintiff<sup>z</sup>. Though if it be stated as the commencement of the action, to avoid a *tender*, the defendant may deny that the plaintiff had any cause of action at the time of suing it out<sup>a</sup>; or if it be replied to a plea of the statute of limitations, the defendant, in order to maintain his plea, may aver the *real* time of suing it out, in opposition to the *teste*<sup>b</sup>.

Where the proceedings are entered with a general *memorandum*, which relates to the first day of term, and the cause of action appears, in *evidence*, to have arisen after the first day of term, but before the suing

<sup>w</sup> Carth. 233.

Cowp. 454.

<sup>x</sup> 2 Ld. Raym. 883.

<sup>z</sup> Bul. Ni. Pri. 151. 1

<sup>y</sup> *Bridges v. Knapton*, &  
*Hardiman v. Whitaker*, cited  
in 2 Bur. 950. 3 Bur. 1243.

Wilf. 146.

<sup>a</sup> 1 Wilf. 141.

<sup>b</sup> 2 Bur. 950.

out of the writ, the plaintiff may produce the writ, in order to shew, that it was really sued out, subsequent to the cause of action<sup>c</sup>. And where, in a similar case, the fact complained of was admitted by the defendant's plea of *son assault demesne*, the court held it to be well enough; for the plaintiff need not give any evidence on this plea, unless to aggravate damages: and the court will not nonsuit him, because it is amendable by a new bill<sup>d</sup>. In like manner, where the defendant pleads *plene administravit*<sup>e</sup>, or a *tender*<sup>f</sup>, he has a right to set up the fact against the fictitious relation, in order to support his plea.

After verdict, a general *memorandum*, by which the cause of action appears to have arisen after the action brought, has been allowed to be rectified by an examination of the real time of filing the *bill*<sup>g</sup>, or of the *bail*<sup>h</sup>, to which the bill relates; but the better and more usual way is to file a *new* bill, and amend by it<sup>i</sup>.

<sup>c</sup> 1 Blac. Rep. 312. 3 2 Keb. 790. S. C. And see Bur. 1241. S. C. Carth. 114. 1 Show. 147.

<sup>d</sup> 2 Str. 1271. 1 Will. 171. S. C.

S. C.

<sup>h</sup> 1 Sid. 432. 2 Lev. 176.

<sup>e</sup> 1 Sid. 432.

T. Jon. 87. 3 Keb. 693. S.

<sup>f</sup> Cowp. 456.

C. But see Carth. 113.

<sup>g</sup> 1 Sid. 373. 2 Keb. 368.

<sup>i</sup> 1 Str. 583. 2 Str. 1151, S. C. 1 Ventr. 135. 2 Lev. 13. 1162. 1 Will. 104.

## C H A P. XIV.

Of the Proceedings against Prisoners in the actual custody of the Marshal, previous to the Plea.

A Prisoner, in the actual custody of the marshal, may be proceeded against by the *same* plaintiff, at whose suit he was arrested, or charged in custody by a *third* person. And the *same* plaintiff may proceed against him, either for the cause of action expressed in the process, or for a *different* cause of action.

If a prisoner be turned over from one custody to another, it is always considered as a continuance of the same imprisonment<sup>a</sup>. Therefore, where a defendant, having been taken or charged in custody of the sheriff, or other officer, by mesne process, is afterwards removed by *habeas corpus*, and committed to the custody of the marshal, the proceedings against him are to be reckoned, from the time of his having been so taken or charged in custody<sup>b</sup>. With this exception, it is a gene-

<sup>a</sup> 1 Bur. 439.

<sup>b</sup> R. H. 26 G. III.

ral rule, that where the defendant is committed to the custody of the marshal, upon a *habeas*<sup>c</sup>, or *cepi corpus*<sup>d</sup>, &c. before declaration, the plaintiff should declare against him, before the end of the term next after such commitment: or, in case of a surrender to the marshal in discharge of bail, before the end of the term next after such surrender, and due notice thereof<sup>e</sup>. But the term of the commitment or surrender is to be accounted one, although the defendant was not committed or surrendered till the last day of vacation<sup>f</sup>.

The mode of proceeding by the *same* plaintiff, against a prisoner in custody of the marshal, upon an *attachment* of privilege<sup>g</sup>, or process in *trespass*, is by filing a *bill* against him, as a prisoner of the court, with the clerk of the declarations in the king's-bench office; and delivering a copy of it, on treble-penny stamped paper, to the defendant, or *turnkey* at the king's-bench prison. But the delivery of a *declaration* is sufficient, without a *bill*, where the prisoner is in custody upon process by *original*. By the practice of this court, no

<sup>c</sup> R. M. 16 Car. II. (b). Mod. 306.

6 Mod. 21.

<sup>e</sup> R. H. 26 G. III. and see

<sup>d</sup> R. M. 1654. § 11. R. E. R. T. 1 Ann. Reg. II.

5 W. & M. Reg. III. § 1. <sup>f</sup> R. T. 2 G. I. (a).

(a). 6 Mod. 254. R. T. 2 <sup>g</sup> Cro. Car. 330.

G. I. and note (a). 8

O

declaration



declaration can be delivered against a prisoner, in custody of the marshal, at the suit of the *same* plaintiff, except in term <sup>h</sup>. And formerly, the defendant was brought into court, by *rule*, in order to be charged with a declaration; there being no occasion for a *habeas corpus*, where it was in the same court <sup>i</sup>. But now, this practice is disused: and there is no occasion for an *affidavit* of the delivery of the declaration, where the defendant is in custody of the marshal <sup>k</sup>.

The time and manner of proceeding against a prisoner, by the *same* plaintiff for a *different* cause of action, are the same as by a *third* person. But neither the plaintiff nor a third person can charge him with a *civil* action, when he is in custody of the marshal, or in any other custody, on a *criminal* account, without leave of the court <sup>l</sup>, or a judge <sup>m</sup>. And a prisoner in custody on an *attachment*, for a contempt, is holden to be a prisoner in custody on a *criminal* account, within the meaning of this rule <sup>n</sup>. But a person attainted of felony,

<sup>h</sup> 2 Bur. 1051, 2.

1 Salk. 354. R. T. 2 G. I. (a).

<sup>i</sup> *Id.* 2 Lil. P. R. 357.

<sup>m</sup> Impey, 518.

<sup>k</sup> R. E. 5 W. & M. Reg. III. § 2. (b).

<sup>n</sup> Pr. Reg. 325. but see

Pr. Reg. 326, 7. Barnes,

<sup>l</sup> T. Raym. 58. 1 Sid.

380. 2 Blac. Rep. 970. as

90. S. C. 1 Lev. 124. 1

to fugitives, &c.

Sid. 154. S. C. 1 Lev. 146.

or even treason, may be charged with a civil action by leave of the court, or a judge; so as it be not to defeat the effect of the king's pardon, by disabling him from going abroad<sup>o</sup>.

A prisoner, once committed to the custody of the marshal, is liable to be charged with a civil action, either by the *same* plaintiff or a *third* person, as long as he remains in actual custody. For though it be a rule, that a prisoner once superseable is always so, yet this holds only with regard to the *same* plaintiff, at whose suit he was superseable<sup>p</sup>; and even with regard to him, it must be understood with this qualification, that the prisoner is only superseable, so long as he remains in the *same* custody, and under the *same* process: for the moment the nature of the custody is changed, the rule ceases. Therefore if a prisoner, on mesne process, be superseable for any irregularity, as for want of the demand of a plea, he cannot take advantage of it, *after* he is charged in execution; supposing he has any opportunity of applying on that ground, *before* he is charged in execution<sup>q</sup>.

<sup>o</sup> 2 Salk. 500. 7 Mod. 1 Blac. Rep. 30. 1 Will.  
153. 2 Ld. Raym. 848. S. 217. Fost. 61. S. C.  
C. Id. 1572. 2 Str. 873. S. P 2 Bur. 1048.  
C. Cas. temp. Hardw. 190. <sup>q</sup> 1 T. R. 591.

The mode of charging a prisoner with an action, in custody of the marshal, in *term* time, is by filing a bill against him, as of that term, and delivering a declaration to the turnkey; after which, he must lie two terms, as to that party, before he can be discharged on common bail<sup>r</sup>. In *vacation*, there was formerly no way to charge him, but by making an entry in the marshal's book, in the king's-bench office, that he should remain in custody, at the suit of the intended plaintiff, which was deemed sufficient to charge him, provided he were then in actual custody; for if he were at liberty, he might have been arrested<sup>r</sup>. But in a modern case<sup>s</sup>, where this matter was fully discussed, the court of king's bench were of opinion, that the right method of charging the defendant with a new suit, in *vacation*, is to file a bill as of the preceding term; and then to deliver to, or leave for the defendant, being in custody, a copy of the declaration, as of the preceding term, and to make an affidavit thereof<sup>t</sup>. For preventing, however, the detainer of prisoners, charged by declarations, in the custody of the marshal,

<sup>r</sup> 6 Mod. 254. 1 Salk. which does not seem to be  
213, 14. 345. 3 Salk. 150. necessary, where the defend-

<sup>s</sup> 2 Bur. 1052. ant is in custody of the mar-

<sup>t</sup> Q. as to the affidavit; shal. *Ante*, 194.

where

where the cause of action against them does not amount to *ten* pounds, it is a rule <sup>u</sup>, that “no declaration shall be sufficient cause of detaining such prisoner in custody, unless an affidavit, that the plaintiff’s cause of action against him does amount to *ten* pounds or upwards, shall be first made and filed with the clerk of the rules, and the sum specified in such affidavit indorsed by him on such declaration, before the same is left with the turnkey.” But this rule is confined to cases where the prisoner is charged with a *new* action; and does not apply, where he is proceeded against by the *same* plaintiff, for the cause of action expressed in the process <sup>v</sup>.

When a bill is filed against a prisoner in custody of the marshal, if a copy of it be delivered for him to the turnkey, *four* days exclusive before the end of the term, a rule to plead given, and a plea demanded, which may be done on the back of the copy when delivered, the defendant shall plead as of that term; but if the bill be not filed, and the copy delivered, four days exclusive before the end of the term, the defendant may imparl until the next term <sup>w</sup>.

<sup>u</sup> R. E. 15 G. II. Reg. S. C.  
III. <sup>w</sup> R. E. 5 W. & M. Reg.  
<sup>v</sup> Barnes, 75. Pr. Reg. 3. (a).  
330. Caf. Prac. C. B. 144.



## C H A P. XVI.

Of the Proceedings against Prisoners in the actual Custody of the Sheriff, &c. previous to the Plea.

**B**EFORE the making of the statute 4 & 5 W. & M. c. 21. there could have been no declaration in this court, against a defendant in custody of the sheriff, or other officer by whom he was arrested; but the plaintiff was obliged to bring a *habeas corpus cum causa*, and so turn him over to the custody of the marshal, in order to charge him with a declaration<sup>a</sup>. But now, by the above statute, which was passed to relieve plaintiffs from the trouble and expence of bringing up prisoners by *habeas corpus*<sup>b</sup>, “ If any defendant be taken  
“ or charged in custody, at the suit of any person, upon any writ, out of any of the courts  
“ at Westminster, and imprisoned for want of  
“ sureties for his appearance, the plaintiff in  
“ such writ may, before the end of the next

<sup>a</sup> See the preamble to the Bur. 1051. 1 T. R. 192. statute; R. M. 1654. § 11. *Ante*, 168.

R. E. 5 W. & M. Reg. III. <sup>b</sup> 1 Willf. 120. 1 T. R. § 1. (a). 1 Willf. 120. 2 192.

“ term

“ term after such writ is returnable, *declare*  
 “ against such prisoner, in the court out of  
 “ which the writ issued, whereupon the said  
 “ prisoner was taken and imprisoned, or  
 “ charged in custody; and may cause a true  
 “ copy thereof to be delivered to such prisoner,  
 “ or to the gaoler or keeper of the prison or  
 “ gaol, in whose custody such prisoner shall be  
 “ or remain: to which declaration the said pri-  
 “ soner shall appear and plead; and if such pri-  
 “ soner shall not appear and plead to the same,  
 “ the plaintiff in such case shall have judgment,  
 “ in such manner as if the prisoner had ap-  
 “ peared, and refused to answer or plead to  
 “ such declaration.”

And by the same statute, § 3. “ In all de-  
 “ clarations, against any prisoner detained  
 “ in prison, by virtue of any writ or process  
 “ issued out of the court of king’s bench,  
 “ it shall be alledged in custody of what she-  
 “ riff, bailiff, or steward of any franchise,  
 “ or other person having the return and execu-  
 “ tion of writs, such prisoner shall be, at the  
 “ time of such declaration, by virtue of the  
 “ process of the said court, at the suit of the plain-  
 “ tiffs; which allegation shall be as good and

\* The words of the statute are, that the plaintiff may *de-  
 clare*, &c. and therefore it does not seem to be necessary  
 to file a *bill*, against a prisoner in custody of the sheriff, &c.

“ effectual, to all intents and purposes, as if such  
 “ prisoner or prisoners were in the custody of  
 “ the marshal.” If the declaration, therefore, do  
 not alledge, either expressly or by implication,  
 at whose suit the defendant is in custody, it will  
 be bad on a general demurrer<sup>d</sup>. This alle-  
 gation, however, is only necessary, where the  
 plaintiff proceeds by *attachment* of privilege, or  
 by bill of *Middlesex*, or other process in trespass.

Upon this statute, a defendant in the actual  
 custody of the sheriff or other officer, upon  
 mesne process, may be proceeded against by  
 the *same* plaintiff, at whose suit he was arrested,  
 or by a *third* person; by the former upon the  
 original *caption*, by the latter upon a subse-  
 quent *charge*, and by either of them upon a  
*recaption*, by virtue of an *escape* warrant<sup>e</sup>.

The mode of charging a defendant in the ac-  
 tual custody of the sheriff, &c. for a *bailable* cause  
 of action, is by making an affidavit thereof, and  
 suing out *process*, which should be duly marked  
 or indorsed for bail, and left at the sheriff's  
 office. But if the cause of action be not bail-  
 able, the *same* plaintiff, or a *third* person, may

<sup>d</sup> 2 Ld. Raym. 1362. 1 upon a *recaption*, see R. T.  
 Wilf. 119, 120. 6 Ann. 6 Mod. 21. 254.

<sup>e</sup> For the time of declaring

proceed

proceed against the defendant, as if he were at large, by serving him with a copy of process <sup>f</sup>.

When the defendant is taken and detained, or charged in custody of the sheriff, &c. the statute expressly provides, that the plaintiff may declare against him, before the end of the *next* term after the process is returnable; and by rule of E. 5 W. & M. <sup>2</sup> if the declaration be not filed within that time, the prisoner shall be discharged on common bail. But a subsequent rule <sup>h</sup> having rather *ambiguously* required, that if the defendant should remain in custody for *two* terms, and the plaintiff should not declare against him within that time, the defendant should be discharged out of custody, after the end of the *second* term after such imprisonment; the judges, in favour of liberty, determined, that where a defendant was arrested in one term, on a writ returnable the next, the term in which the defendant was arrested should be reckoned as one of the two terms; and consequently, that the defendant should be discharged, for want of a declaration, after the end of the same term in which the writ was returnable <sup>i</sup>. This practice, however, has been since altered; and it is now settled, agreeably to the letter and intention of the statute, that "in

<sup>f</sup> 1 T. R. 192.

<sup>h</sup> R. T. 2 G. I.

<sup>2</sup> Reg. III. § 6. and see <sup>i</sup> 3 Bur. 1448. 4 Bur. Carth. 469. 1 Salk. 98. S. C. 2060.

" all



“ all cases where a prisoner is taken or charged  
 “ in custody, by mesne process issuing out of this  
 “ court, the plaintiff may declare against him,  
 “ before the end of the next term after the re-  
 “ turn of the process, by virtue whereof he was  
 “ taken or charged in custody <sup>k</sup>.” The term  
 however, in which the process, whereon the de-  
 fendant was arrested, is returnable, is still ac-  
 counted one of the two terms; although it be  
 returnable on the last day of the term <sup>l</sup>. And  
 the plaintiff cannot declare *before* the return of  
 the process, upon which the defendant was  
 taken or charged in custody <sup>m</sup>.

If the defendant be taken and detained, or  
 charged in the custody of the sheriff, &c. for  
 a *bailable* cause of action, a copy of the decla-  
 ration should be delivered personally to the  
 defendant, or left for him with the gaoler, or  
 keeper of the gaol or prison, in whose custody  
 he is confined <sup>n</sup>; it not being sufficient, in such  
 case, to leave a declaration in the office, to  
 which the defendant is not obliged to plead, and  
 on which the plaintiff cannot take a regular  
 judgment <sup>o</sup>. And “ if any gaoler or keeper of

<sup>k</sup> R. H. 26 G. III.

III. § 1.

<sup>l</sup> R. T. 2 G. I. (*a*).

<sup>n</sup> Stat. 4 & 5 W. & M. c. 21,

<sup>m</sup> R. E. 5 W. & M. Reg.

§ 1 Str. 474.

“ a prison,

“ a prison, having received a copy of a declaration, against any prisoner in his custody, shall suppress the same, and not deliver it forth-  
 “ with unto such prisoner, an attachment shall be issued against him<sup>p</sup>.” But if the defendant be served, in custody of the sheriff, &c. with a copy of process, at the suit of the *same* or a *different* plaintiff, it is not necessary that a copy of the declaration should be delivered personally to the defendant, or left for him with the gaoler or turnkey; but it may be delivered or filed, absolutely or *de bene esse*, and the plaintiff may proceed thereon, as if the defendant were at large<sup>q</sup>.

The plaintiff having declared, an *affidavit* should be made and filed, with the clerk of the rules, before the first day of the ensuing term<sup>r</sup>; stating the delivery of a copy of the declaration, and the time when, and person to whom, the same was delivered<sup>s</sup>; if to a gaoler or turnkey, that he acknowledged the defendant was then a prisoner in his custody<sup>t</sup>; and that the defendant was arrested, or charged in custody, by process of this court, returnable before the delivery of the copy<sup>u</sup>. The time when such affidavit was

<sup>p</sup> R. E. 5 W. & M. Reg. III. § 7.

<sup>q</sup> 1 T. R. 192.

<sup>r</sup> R. H. 26 G. III.

<sup>s</sup> R. E. 5 W. & M. Reg. III. § 2.

<sup>t</sup> *Id.* (a).

filed,

filed, should be entered thereon, by the clerk of the rules, and a copy of it produced to the secondary, before judgment<sup>u</sup>. Hence it is necessary, and usual in practice, where the defendant is in custody of the sheriff, &c. to have *three* copies of the declaration; one to be delivered to the defendant, or left for him with the gaoler or turnkey; another to be annexed to the original affidavit of such delivery, and filed with the clerk of the rules; and a third, to be annexed to an office copy of such affidavit: on this last copy, the master will give a rule, which the clerk of the rules enters in his paper, for the defendant to appear and plead; and on default thereof, judgment may be signed<sup>v</sup>.

The times of appearing and pleading, when the defendant is in custody of the sheriff, &c. are regulated as follows: That “upon every arrest, by mesne process out of this court, returnable the first day of Easter or Michaelmas term, if a copy of the declaration be delivered against the defendant, before one month from the day of Easter, or the morrow of All Souls,” (that is, before the *third* return of Easter term, or of Michaelmas term, as it then stood<sup>v</sup>;) “and affidavit thereof made and filed, and the defendant do not ap-

<sup>u</sup> R. E. 5 W. & M. Reg. since shortened, by the statute 24 G. II. c. 48.  
III. § 2. (*b*).

<sup>v</sup> This term having been

“pear,

“pear, before the end of *ten* days after those  
 “terms respectively, judgment may be entered  
 “against him, if rules have been given: but it  
 “he appear within that time, he shall imparl  
 “until the next term; unless the action be in  
 “London or Middlesex, and the defendant  
 “be in prison within forty miles of London  
 “or Westminster: Then, though he appear  
 “before the expiration of that time, he shall  
 “plead *two* days before the effoin day of the  
 “next term: and in default thereof, rules  
 “having been given, judgment may be entered  
 “against him as aforesaid.”

That “if a copy of the declaration be deli-  
 “vered against such defendant, on or after one  
 “month from the day of Easter in Easter term,  
 “or the morrow of All Souls in Michaelmas  
 “term, or in Hilary or Trinity term, and  
 “thereupon the plaintiff give rules to appear  
 “and answer, then, if the defendant appear  
 “*two* days before the effoin day of the next  
 “term, he shall imparl until the next term; but  
 “if he do not appear within that time, judg-  
 “ment may be given against him \*.”

And that “if a writ be returnable in any  
 “term, and a copy of the declaration have

\* R. E. 5 W. & M. Reg.    \* *Id.* § 4.

III. § 3.

“been



“ been delivered before the effoin day of  
“ the next term, the plaintiff, in such next  
“ term, may give rules to appear and answer :  
“ And if the defendant do not appear and  
“ plead, upon the expiration of the rules,  
“ judgment shall be given against him<sup>v</sup>.”

When the defendant is in custody of the sheriff, &c. the demand of a plea is unnecessary<sup>z</sup>. But in every other respect, the proceedings subsequent to the declaration, against a defendant in custody of the sheriff, &c. are similar to the proceedings against him, when in custody of the marshal.

<sup>v</sup> R. E. 5 W. & M. Reg. III. § 5.    <sup>z</sup> 1 T. R. 591.

## C H A P. XVII.

Of the Proceedings against Prisoners in the  
actual Custody of the Marshal or Sheriff,  
&c. subsequent to the Plea.

**A**FTER the delivery of the declaration against a prisoner, in custody of the marshal or sheriff, &c. except on a *surrender* in discharge of bail, the plaintiff should proceed to trial, or final judgment, within *three* terms next after such declaration delivered, if by the course of the court he can so proceed; of which three terms, the term of the declaration is one<sup>a</sup>: and should cause the defendant to be charged in execution, within *two* terms next after such trial or judgment; of which two terms, the term wherein the trial was had, or judgment obtained, is also one<sup>a</sup>: in case no writ of error be depending, nor injunction obtained, for stay of proceedings. And if any writ of error be depending, or injunction obtained, then within *two* terms next after the judgment be affirmed, the writ

<sup>a</sup> R. H. 26 G. III. And see R. T. 2 G. I. and the notes thereon.

of error *nonpros'd* or discontinued, or the injunction dissolved; including the term of the affirmance, *nonpros*, discontinuance, or dissolving the injunction<sup>a</sup>.

In case of a *surrender* to the marshal, in discharge of bail, after declaration, the plaintiff should proceed to trial, or final judgment, within *three* terms next after such surrender, and due notice thereof, if by the course of the court he can so proceed; of which three terms, the term of the surrender is one<sup>b</sup>: or, in case of a surrender in discharge of bail, after trial or final judgment, he should cause the defendant to be charged in execution, within *two* terms next after such surrender, and due notice thereof; of which two terms, the term of the surrender is also one<sup>b</sup>: in case no writ of error be depending, nor injunction obtained, for stay of proceedings. And if any writ of error be depending, or injunction obtained, then within *two* terms next after the judgment be affirmed, &c<sup>b</sup>.

To *charge* a defendant in execution, the proceedings must be entered on record, and the judgment-roll docketed and filed: after which, if the defendant be a prisoner in the king's bench prison, the plaintiff's attorney should

<sup>b</sup> R. T. 2 G. I. (*b*). 1 Wils. 297. 2 Wils. 325. 3 Bur. 1787. 4 Bur. 2060. R. H. 26 G. III.

obtain

obtain a rule, from the clerk of the rules, for the marshal to acknowledge him in his custody<sup>c</sup>; and the marshal, being served with a copy of the rule, will write his acknowledgment at the bottom of it, which ought to be of the *same* term, in which the defendant is charged in execution, and not of a *preceding* term<sup>d</sup>. A *committitur*-piece should be then drawn up, on unstamped parchment, in the form of a bail-piece, and the *committitur* entered in the marshal's book<sup>e</sup>; after which the *committitur*-piece should be filed, with the clerk of the judgments, in order that he may enter the *committitur* on record: for unless it be actually entered on record, before the end of the second term, the defendant is super-sedeable; and there is no extension of the time to the continuance-day after term, nor is it sufficient, that there be an entry in the marshal's book in time<sup>f</sup>. Where the defendant has been once committed, a second commitment for the same cause, before the first is discharged, or notice given that it is abandoned, is clearly informal<sup>g</sup>.

To charge the defendant in execution in a county-gaol, a writ of *capias ad satisfaciendum* must be sued out, and lodged

<sup>c</sup> R. T. 2 G. I. § 2. (b).

<sup>f</sup> 2 Str. 1215, 1226. 3

<sup>d</sup> 1 T. R. 464.

Bur. 1841.

<sup>e</sup> 2 Bur. 1049.

<sup>g</sup> 1 T. R. 227.



with the sheriff<sup>h</sup>. If the defendant be removed, after declaration, to the *Fleet*, or found in the prison of an *inferior* court, the mode of charging him in execution is by writ of *habeas corpus ad satisfaciendum*, returnable in court, on a day certain in term; and the number of the judgment-roll must be indorsed on the *habeas corpus*<sup>i</sup>. Nor is the prisoner bound to give notice of his removal; but the plaintiff must take notice of it at his peril. Therefore where a prisoner, who had been surrendered in discharge of his bail, and afterwards removed to the *Fleet*, without giving any notice to the plaintiff, was charged in execution, as a prisoner in the king's bench, the court granted a *supersedeas*; for the plaintiff should have demanded to see the prisoner, and, if not produced, would have known where to find him, and bring him back by *habeas corpus*, to charge him: and it would be putting difficulties upon prisoners, to oblige them to give notice<sup>k</sup>. When the defendant is charged, by any of these means, the execution is considered as executed; and therefore, where the plaintiff afterwards died, it was holden that his executors were not bound to revive the

<sup>h</sup> Impey, 514. But see § 7. R. T. 2 G. I. (6).  
Barnes, 389.

<sup>k</sup> 2 Str. 1153.

<sup>i</sup> 1 Sid. 100. R. M. 1654.

judgment

judgment by *scire facias*; or to charge the defendant in execution *de novo*<sup>1</sup>.

If the declaration be not delivered, and an affidavit thereof duly made and filed, (where the defendant is in custody of the sheriff, &c.) or if the plaintiff do not proceed to trial or final judgment, or cause the defendant to be charged in execution, in due time, the defendant may be discharged out of custody, by writ of *superfedeas* or otherwise, according to the course of the court, on filing common bail by *bill*, or entering a common appearance by *original*; unless, upon notice given to the plaintiff's attorney, good cause be shewn to the contrary<sup>m</sup>. And the defendant may also be discharged out of custody, when the action is abated, discontinued, or decided in his favour.

To *discharge* a prisoner for not declaring, or for not proceeding to final judgment or execution, in due time, the defendant's attorney or agent should obtain a certificate<sup>n</sup>, or copy of

<sup>1</sup> *King v. Millett*, H. 22 the defendant. R. T. 2 G. I. G. III. § 1. (b). 1 Str. 474. But

<sup>m</sup> R. H. 26 G. III. And see this certificate was found to R. E. 5 W. & M. Reg III. § be useless; as the filing of a 6. R. T. 2 G. I. Say. Rep. 111. bill or declaration might be

<sup>n</sup> It was formerly necessary shewn for cause against the to get a certificate from the defendant's discharge, and clerk of the declarations, therefore it is now dispensed that no bill or declaration with.

was filed in his office against

the causes wherewith he stands charged, from the clerk of the papers of the king's-bench prison, if in custody of the marshal; or, if in custody of a sheriff or other officer, from the gaoler or keeper of the prison in which he is confined<sup>o</sup>; and in the latter case, an *affidavit* must be made, of his having signed the same<sup>p</sup>: upon which a summons should be taken out, and served on the plaintiff's attorney or agent, to attend a judge, and shew cause, why the defendant should not be discharged out of the custody of the *marshal*; or, if in custody of a *sheriff*, &c. why a writ of *supersedeas* should not issue to discharge him, on filing common bail by *bill*, or entering a common appearance by *original*. At the time appointed by the summons, the plaintiff's attorney or agent either attends and consents to an order, shews cause against it, or does not attend. In the latter case, an *affidavit* being made of the service and attendance, the judge will make an order for the defendant's discharge, on the *first* summons<sup>q</sup>, if the application be for not declaring: but if it be for not proceeding to judgment or execution in due time, there must be *three* summonses<sup>r</sup>, before the judge will make an

<sup>o</sup> R. T. 2 G. I. § 1. (b).      <sup>q</sup> *Id.* 523.

<sup>p</sup> Impey, 522, 525.      <sup>r</sup> *Id.* 526.

order for non-attendance; and in a country cause, the order, on an attendance, is not absolute in the first instance, but only an order *nisi*, unless cause be shewn in a week, to give the agent an opportunity of writing to his client for instructions<sup>t</sup>. When an order is made for the defendant's discharge, common bail should be filed with the clerk of the common bails by *bill*, or a common appearance entered with the *filacer* by *original*<sup>u</sup>; and if the defendant be in custody of the marshal, a certificate from the clerk of the bails or *filacer*, of the bail being filed, or an appearance entered, will be a sufficient ground for discharging him, without a *superfedeas*<sup>v</sup>. But if the defendant be in custody of a sheriff or other officer, he must sue out a writ of *superfedeas*; for issuing which, by *bill*, the bail-piece, signed by one of the judges, is a warrant to the officer, with whom it is to be left; and he delivers it over to the clerk of the common bails to be filed<sup>w</sup>. By *original*, the writ of *superfedeas* is made out by the *filacer*<sup>x</sup>.

Having thus shewn in what manner the defendant is to be discharged, it will be proper to consider what causes may be assigned, and will be deemed sufficient to pre-

<sup>t</sup> Impey, 526.

<sup>w</sup> *Id. ibid.*

<sup>u</sup> *Id. ibid.*

<sup>x</sup> Trye, in *pref.*

<sup>v</sup> R. T. 2 G. I. § 2. (b).



vent his discharge, for not declaring, proceeding to trial or final judgment, or charging him in execution. Where there are two defendants, and one of them is arrested and detained in prison, but the other absconds, so that the plaintiff is obliged to proceed to outlawry against him, this seems to be a good cause for not declaring against the defendant who is in prison, until the other defendant be outlawed<sup>y</sup>. But it is said, that in such case the plaintiff must move for time to declare, against the defendant in custody<sup>z</sup>.

After declaration, if the *venue* be laid in a county where the assizes are holden but once a year, it may be impossible, by the course of the court, for the plaintiff to try his cause in *three* terms: this therefore, when it happens, is allowed to be a good cause for not proceeding to trial<sup>a</sup>. So where the writ, in a country cause, was returnable in Michaelmas term, and the plaintiff declared in Hilary, and the defendant imparled till Easter term, by which means the plaintiff was disabled from proceeding to trial, till the next summer assizes, a judge refused to grant a *superfedeas*<sup>b</sup>. And in

<sup>y</sup> Barnes, 401. 2 Blac. 2 Crompt. 9.

Rep. 759. Pr. Reg. 327.

<sup>a</sup> Barnes, 383.

*semb. contra.*

<sup>b</sup> *Cripps and Wiggin, T.*

<sup>z</sup> *Per cur.* E. 12 G. III. 28 G. III.

like

like manner, where the court take time to give judgment on *demurrer*, &c. they will not suffer the plaintiff to be prejudiced, but will allow this to be a good cause for not proceeding to final judgment<sup>c</sup>.

After trial or final judgment, a writ of error and injunction are, whilst they continue in force, good causes for not charging the defendant in execution<sup>d</sup>. And a regular treaty of accommodation, or agreement for a compromise, is, in any stage of the action, a good cause for not declaring, &c<sup>e</sup>. But no treaty or agreement is sufficient to prevent a *superfedeas*, unless it be in writing, signed by the defendant or his attorney, or some person duly authorized by the defendant; and it be expressed therein, that proceedings are stayed at the defendant's request<sup>f</sup>.

If the defendant be superseded, or supersedeable, for want of proceedings *before* judgment, the plaintiff may, nevertheless, take or charge him in execution, at any time *after* judgment<sup>g</sup>. But he cannot do so, if the defendant be superseded, or supersedeable, for want of being charged in execution<sup>h</sup>. And in the lat-

<sup>a</sup> Barnes, 383.

<sup>g</sup> R. T. 2 G. I. § 1. (c).

<sup>d</sup> 2 Wils. 380. R. H. 26 G. III. <sup>1</sup> T. R. 591. (a). *Davies* and *Brown*, in the exchequer,

<sup>e</sup> 4 Bur. 2063. 3 Wils. 455. M. 27 G. III. S. P.

<sup>f</sup> R. H. 26 G. III.

<sup>h</sup> R. T. 2 G. I. § 1. (c).

ter case, the defendant cannot be holden to special bail in a second action, upon the judgment<sup>1</sup>. The *supersedeas*, however, in the first action, cannot be pleaded in bar of the second<sup>k</sup>: And after judgment obtained in the second action, the defendant is again liable to be taken in execution<sup>1</sup>.

<sup>1</sup> Cowp. 72.

<sup>1</sup> Cowp. 72.

<sup>k</sup> 1 T. R. 273.

## C H A P. XVIII.

Of the Declaration by original Writ, and Bill against Defendants in the supposed Custody of the Marshal.

HAVING done with the proceedings against *prisoners*, in the actual custody of the marshal and sheriff, &c. we are now to suppose the defendant *at large*, and to consider the time and manner of declaring against him, by *original writ*; or by *bill*, alledging him to be in custody of the marshal.

Upon an *original writ*, the plaintiff must declare *in chief*, for the same cause of action as is expressed in the process; and he cannot declare *by the bye*, for a different cause of action, after the end of the term in which the process is returnable: nor can any other person declare *by the bye* at all. But upon process in *trespass*, when the defendant has filed bail, or the plaintiff has filed it for him, according to the statute, the plaintiff may declare *in chief*, for any cause of action whatever<sup>a</sup>; and he may declare *by the bye*, in as many dif-

<sup>a</sup> R. E. 15 G. II. Reg. 1. Cowp. 455.

ferent



ferent actions as he thinks fit, at any time before the end of the next term after the return of the process<sup>b</sup>. It is also a settled point, that when bail is filed by the *defendant*, upon such process, any other person, besides the plaintiff, may declare against him *by the bye*, at any time during the term wherein the process is returnable, *sedente curiâ*<sup>c</sup>: and he need not wait to declare, till the delivery of the declaration *in chief*<sup>d</sup>. But where bail is filed by the *plaintiff*, according to the statute, this is not such a general bringing of the defendant into court, as will warrant any person, except the plaintiff, in delivering a declaration *by the bye* against him<sup>e</sup>.

Anciently, when the proceedings by *original* were *ore tenus*, at the bar of the court, the plaintiff was demandable on the defendant's appearance; and if he did not appear, or would not count against him, he might have been immediately nonsuited<sup>f</sup>. But the parties, by *consent*, might have obtained a day before decla-

<sup>b</sup> R. M. 10 G. II. Reg.      <sup>d</sup> Con. Phillips's case, 1  
1. (b). But see Gilb. K. B. Crompt. 100.  
310.      <sup>e</sup> 2 Str. 1027. Cal. temp.

<sup>c</sup> Poph. 146. Carth. 377. Hardw. 207. S. C. R. M.  
1 Salk. 2. S. C. Gilb. K. 10 G. II. Reg. 1.

B. 310, 342. 4 Bur. 2181.      <sup>f</sup> 2 Hen. IV. 15, 23. 22  
3 T. R. 627.      Edw. IV. 1.

ration, which was called a *dies datus prece partium* <sup>g</sup>; for the consent of the defendant exempted the plaintiff from the necessity of declaring immediately. In that case, if the defendant had made default at the day given, since there was no declaration, the plaintiff could not have had judgment, but was obliged to bring him in again by process <sup>h</sup>: for none could have judgment, but upon complaint exhibited against the defendant whilst in court. But after declaration, if the defendant had made default, judgment was given against him; because having deserted the court, he ceased to oppose the plaintiff's demands, and so submitted that the court should give judgment <sup>i</sup>.

In process of time, when the proceedings were no longer *ore tenus*, but the defendant was at liberty to appear by attorney, the defendant could not have nonsuited the plaintiff, without giving a rule to declare, and calling for a declaration. If the writ were returnable in *five weeks of Easter*, or on the *last* return of any term, the defendant, having given a rule, and called for a declaration, might have entered a nonsuit, if it were not delivered four

<sup>g</sup> Hardr. 365.

153. S. C. 6 Mod. 6, 7, 8.

<sup>h</sup> 19 Hen. VIII. 6. Moor, 79.

<sup>i</sup> Salk. 216. S. C.

<sup>3</sup> Leon. 14. Benl. & Dalis.

<sup>i</sup> Gilb. C. P. 40, 41.

days,

days, or more, before the effoin-day of the ensuing term<sup>k</sup>: and if the writ were returnable on any other return, the defendant, having in like manner given a rule, and called for a declaration, might have entered a nonsuit, if it were not delivered some time during the same term<sup>l</sup>. But if the defendant had appeared the first term, and given no rule to declare, the defendant's attorney might have been compelled to accept a declaration the second term, with an imparlance; and the declaration might have been entered as of that term, with an imparlance over to the next term, or in the first term with an *incipitur*, as the case required<sup>m</sup>. In such case, however, if the plaintiff had not declared the second term, a nonsuit might have been entered at the end of the second term, upon a continuance over by *dies datus*, but not the third term or after<sup>n</sup>.

This was plainly agreeable to the *ancient* practice of the court of common pleas°. And now the plaintiff, according to the *modern* practice of that court, has a general liberty to declare by original, till the end of the next term after the return of the process, whether it be return-

<sup>k</sup> R. M. 1654. § 15.      <sup>n</sup> *Id. ibid.*

K. B.

<sup>o</sup> R. M. 1654. § 14, 15.

<sup>l</sup> R. M. 1654. § 15. C. B.      C. B.

<sup>m</sup> R. M. 1654. § 15. K. B.

able on the first, or any other return of the term<sup>p</sup>. But still the defendant must, before the end of the second term, or within four days after, enter a rule for the plaintiff to declare, and demand a declaration in writing<sup>q</sup>; and if the plaintiff do not declare before the rule is out, the defendant may, at any time before the effoin day of the next term, sign a *non-pros*, but not afterwards<sup>r</sup>: and the plaintiff is not allowed any longer time to declare, without leave, than the time limited by the defendant's rule<sup>s</sup>. But if the plaintiff be not called upon by rule to declare, he hath all the vacation of the second term to declare in<sup>t</sup>.

The declaration is a legal specification of the cause of action: and, in actions by *original*, should be *entitled* of the term in which it is filed or delivered. The *venue* should be laid in the county where the original was brought; for otherwise, we have seen, the plaintiff will lose his bail<sup>u</sup>. In *account, annuity, covenant, debt, detinue*, and *replevin*, where the original is a *summons*, the declaration begins by stating, that the defendant was *summoned* to answer: in ac-

<sup>p</sup> R. H. 9 Ann. C. B. K. B.

<sup>q</sup> R. M. 1 G. II. Reg. 2. <sup>r</sup> R. H. 9 Ann. C. B. C. B. <sup>t</sup> Pr. Reg. 121.

<sup>s</sup> R. H. 9 Ann. C. B. R. <sup>u</sup> *Ante*, 151. R. H. 22 M. 10 G. II. Reg. 2. (*b*). G. III. C. B. *contra*.



tions on the *case*, *ejectment*, *trespass*, &c. where the original is an *attachment*, it states, that he was *attached* to answer<sup>v</sup>. But where by the declaration it appears, that the defendant was *summoned* instead of *attached*, or *vice versa*, the defendant cannot demur, without craving *oyer* of the original, and setting it forth, in order to shew that it does not warrant the declaration<sup>w</sup>.

It was formerly usual, for the declaration to repeat the whole of the original writ<sup>x</sup>. But this practice being productive of great and unnecessary prolixity, a rule of court was made, that "declarations in actions upon the *case*,  
" and *general* statutes, other than *debt*, repeat  
" not the original writ, but only the nature of  
" the action; as that the defendant was *at-*  
" *tached* to answer the plaintiff, in a *plea of tres-*  
" *pass upon the case*, or in a *plea of trespass and*  
" *contempt, against the form of the statute*<sup>y</sup>." And even in *trespass, vi et armis*, commenced by original, it has been deemed sufficient, on a general demurrer, to state, in the declaration, that the defendant was attached to answer the

<sup>v</sup> Com. Dig. tit. *Pleader*, C. Fort. 341. Cal. temp. C. 12. Hardw. 189. *Barnard v. Moss*,

<sup>w</sup> Cro. Jac. 108. Cro. C. B.

Car. 91. 1 Saund. 318. 1 <sup>x</sup> Com. Dig. tit. *Pleader*, Sid. 423. 2 Keb. 544. 1 C. 12.

Mod. 3. S. C. 4 Mod. 246. <sup>y</sup> R. M. 1654. § 12.

2 Salk. 701. 6 Mod. 28. S.

plaintiff

plaintiff in a plea of trespass, without setting forth the circumstances <sup>z</sup>.

In actions by *bill*, the plaintiff may declare, as a matter of course, at any time before the end of the next term after the return of the process <sup>z</sup>: and if he be not ready to declare within that time, he may obtain a *side-bar* rule, from the clerk of the rules, for further time to declare, until the first day of the ensuing term; a copy of which rule should be served on the defendant's attorney, or stuck up in the king's-bench office, if the defendant have not appeared <sup>b</sup>. This rule cannot, in general, be had where the defendant is a prisoner <sup>c</sup>. But where, on a writ against three, one was arrested and lay in gaol, and the other two absconded, the court refused to discharge the prisoner; saying, that he must appear for all, or lie in gaol till the other two be outlawed <sup>d</sup>. But the plaintiff, in such case, should move the court, or apply to a judge, for time to declare

<sup>z</sup> Carth. 108.

<sup>2</sup> Stat. 13 Car. II. stat. 2. c. 2. § 3. And for the ancient time of declaring by *bill*, see Gilb. C. P. 40, 41. Stat. 8 Eliz. c. 2. Hanf. introd. 2. 3 Bulst. 214. Cro. Jac. 620. 2 Keb. 478, 812.

12 Mod. 217. R. M. 10 G. II. Reg. 2. (b). 2 T. R. 112. 3 T. R. 123, 4.

<sup>b</sup> Impey, 153.

<sup>c</sup> Pr. Reg. 327.

<sup>d</sup> *Per Cur.* E. 12 G. III.

2 Cromp. 9. Barnes, 396, 401. 2 Blac. Rep. 759.

against

against the prisoner, until the outlawry or appearance of the other defendants<sup>e</sup>. If the plaintiff be still unprepared, he may obtain other rules for time to declare, from the beginning to the end of the term, and from the end of one term to the beginning of another, alternately, as often as may be necessary. But after several rules have been obtained, the court, on motion, will make a *peremptory* one, for the plaintiff to declare, before the end of the term, in which the motion is made<sup>f</sup>.

The declaration upon the *bill* is a mere copy of it; and should correspond with the process, in the names and description of the parties: for if there be a material variance, the court will set aside the proceedings. But where process is taken out against the defendant by a *wrong* name, and he appears by his *right* name, the plaintiff may declare against him by the name in which he appears, stating that he was arrested, or served with process, by the other: for by appearing, the defendant admits himself to be the person sued; and so the variance is immaterial<sup>g</sup>. In such case, however, if the defendant do not appear, the plaintiff cannot rectify the mistake by appear-

<sup>e</sup> *Id. ibid.*

<sup>f</sup> Impey, 153.

<sup>g</sup> *Green and Robinson, H.*

23 G. III. *Boyne against Mills,*

M. 25 G. III. 3 T. R. 611.

ing for him, in his *right* name, according to the statute<sup>h</sup>.

Upon *general* process, the plaintiff may declare *qui tam*, or as executor or administrator, &c.<sup>i</sup>. But this rule will not hold *é converso*, for where the process was to answer the plaintiff *qui tam*, &c. and the declaration was in his own name only, omitting the *qui tam* part, the court held the variance to be fatal, and set aside the proceedings<sup>k</sup>. In a subsequent case, the proceedings were set aside, where the process was to answer the plaintiffs as *assignees* of a bankrupt, and the declaration was in their own right; for the plaintiffs cannot declare generally, on process sued out in a special character<sup>l</sup>.

The declaration by *bill* should regularly be *entitled* of the day on which the writ is returnable: for the bill, of which it is a copy, can-

<sup>h</sup> 3 T. R. 611.

<sup>i</sup> 2 Str. 1232.

<sup>k</sup> 4 Bur. 2417.

<sup>l</sup> *Meggs* and another, assignees of *Cochran*, against *Ford*, E. 25 G. III. It appears, however, to have been the opinion of *Yates*, Just. in the case of *Canning* and

*Davis*, (4 Bur. 2417.) that though the plaintiff stile himself *executor*, or give himself any other superfluous description in the process, and declare otherwise, yet this will not hurt, for the demand is still the same. 2 Blac. Rep. 722. 3 Wils. 141. S. C.

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not



not be filed till bail is put in, which cannot be till the return of the writ<sup>m</sup>. And where there are several defendants, who put in bail of different terms, the declaration should be entitled of the term when the last bail was put in<sup>n</sup>. In practice it is usual, when the cause of action will admit of it, to entitle the declaration *generally*, of the term in which the writ is returnable; and though filed or delivered, it cannot regularly be entitled, of a subsequent term<sup>o</sup>. But it should always be entitled, after the time when the cause of action is stated to have accrued: therefore, where the cause of action is stated to have accrued, after the first day of the term in which the writ is returnable, the declaration should be entitled of a subsequent day in that term, and not of the term generally: for a general title refers to the first day of the term; and upon such a title, it would appear that the action was commenced, before the cause of it accrued. Yet, where the cause of action was stated to have accrued on the first day of term, the court on demurrer held, that the declaration might be entitled of the term generally; for the delivery of the declaration

<sup>m</sup> Cas. temp. Hardw. 141.

But *vide ante*, 187.

<sup>n</sup> 1 Will. 242.

<sup>o</sup> 3 T. R. 624.

is the act of the party, and in ancient times it could not have been delivered till the sitting of the court: so that the cause of action might well have accrued, before the actual delivery of the declaration<sup>p</sup>. Where a declaration is improperly entitled, the plaintiff may have it corrected, on an affidavit of the fact<sup>q</sup>. Or it may be set right, at the instance of the defendant, if necessary for his defence: Thus, where the declaration is entitled of the term generally, and the defendant pleads *plene administravit*<sup>r</sup>, or a *tender* made before the exhibiting of the bill, upon which he would give in evidence an administration of assets, or tender made, between the first day of the term to which the bill relates, and the day of suing out the writ; he has a right to call upon the plaintiff, to entitle his declaration properly<sup>s</sup>.

The *venue* by bill is local or transitory, as by original<sup>t</sup>. In *local* actions, it must be laid in the county where the cause of action arose: In *transitory* actions, it may be laid in any county. The county in the margin will help, but not

<sup>p</sup> 1 T. R. 116.

<sup>q</sup> 1 Willf. 78.

<sup>r</sup> Caf. temp. Hardw. 141.

<sup>s</sup> 1 Str. 638. 1 Willf. 39.

S. C. cited. 1 Willf. 304. S.

P.

<sup>t</sup> *Ante*, 10.

hurt<sup>u</sup>. Hence, if there be no venue laid in the body of the declaration, reference must be had to the margin; but where a proper venue is laid in the body, the word in the margin will not vitiate it<sup>v</sup>. The *charge* of the declaration ought to be express and positive, and not merely by way of recital. Therefore in *trespass*, where the injury is immediate, a declaration by *bill*, stating that *whereas*, or *wherefore*, the defendant did the act complained of, is bad on special demurrer; and was formerly holden to be so, in arrest of judgment<sup>w</sup>: but now, it may be amended, at any time before or after judgment, by a right bill; the time of filing whereof the court will not inquire into<sup>x</sup>. And by *original*, the count-part being helped by the recital of the writ, this fault is not fatal, even on a special demurrer<sup>y</sup>. It was anciently necessary to find *pledges* to prosecute, and add their names to the *bill* and declaration<sup>z</sup>:

<sup>u</sup> Lord *Hardwicke* was of opinion, that the word *ss.* in the margin of the declaration, was not originally meant to signify the county, but was only a denotation of each section or paragraph in the record. *Caf. temp. Hardw.* 344.

<sup>v</sup> *Caf. temp. Hardw.* 343,

4. *Barnes*, 483. 3 T. R. 387.

<sup>w</sup> 2 *Salk.* 636. 1 *Str.* 621.

<sup>x</sup> 2 *Str.* 1151, 1162.

<sup>y</sup> 1 *Wils.* 99. *Barnes*, 452. S. C. 2 *Wils.* 203.

<sup>z</sup> 9 *Edw. IV.* 27. *Bro. Abr. tit. Bill*, 15. *tit. Pledges*, 11. *Dyer*, 288.

But

But they are now holden to be mere matter of form, and may be found at any time before judgment<sup>a</sup>.

The declaration itself was formerly delivered to the defendant's attorney, who made a *copy* of it, and then delivered it back<sup>b</sup>. But the copy is now made, on treble-penny stamped paper, by the plaintiff's attorney<sup>b</sup>; and either *delivered* to the defendant's attorney, or *filed* with the clerk of the declarations, in the king's-bench office. Where the defendant has appeared or filed bail, a copy of the declaration should be *delivered* to his attorney<sup>c</sup>, who should pay for the same, after the rate of *four-pence per sheet*, computing seventy-two words to a sheet, together with the stamps or king's duty<sup>d</sup>; and *four-pence* for the warrant of attorney<sup>e</sup>. In

<sup>a</sup> 18 Edw. IV. 9. 2 Hen. Raym. 1407. by which this  
VII. 1, 17. Stat. 4 & 5 rule appears to have been  
Ann. c. 16. § 1. Fort. 330. made in T. 11 G. I. before  
Caf. *temp.* Hardw. 315. the statute 12 G. I. c. 29.  
Barnes, 163. 1 Wils. 226. and the rule upon that sta-  
2 Wils. 142. tute, of T. 2 G. I.

<sup>b</sup> R. T. 12 W. III.

<sup>d</sup> R. T. 12 W. III. and

<sup>c</sup> R. T. 2 G. II. But see note (a).

8 Mod. 379. and 2 Ld.

<sup>e</sup> R. M. 5 Ann. Reg. II.



such case, a delivery to the party himself is not good<sup>f</sup>. But where the defendant has not appeared or filed bail, or the defendant's attorney, or his clerk in his absence, refuses to pay for a copy of the declaration, or if the abode of the defendant's attorney be unknown to the plaintiff's attorney, the copy should be *filed*, with the clerk of the declarations, in the king's-bench office; and notice thereof given, without delay, to the defendant or his attorney<sup>g</sup>.

When the declaration is *delivered*, a notice to plead should be indorsed on it. But when it is *filed*, the notice need not be indorsed<sup>h</sup>; but should be delivered to, or left at the last or most usual place of abode of the defendant<sup>i</sup>, or his attorney. And where an appearance is entered, or common bail filed by the plaintiff, according to the statute, the notice should express the nature of the action, at whose suit it is prosecuted, and the time limited by the rules of the court for pleading; and that in case the defendant do not plead by such limited time, judgment will be entered against him by default<sup>i</sup>.

<sup>f</sup> Lofft, 332.

<sup>h</sup> Barnes, 226, 7. But

<sup>g</sup> R. T. 12 W. III. R. see Barnes, 310.

T. 2 G. II.

<sup>i</sup> R. T. 1 G. II.

If the declaration be *filed*, and notice thereof given to the defendant or his attorney, it is deemed to be a good declaration, from the time of such notice only<sup>k</sup>; and therefore a rule to plead, given before notice of declaration, is irregular<sup>l</sup>. Yet, where the declaration was filed, on the last day of the second term after the return of the writ, but the notice was not given till a little before the effoin-day of the following term, this was holden to be well enough; the master certifying it to be the practice<sup>m</sup>. The defendant must always receive and pay for a copy of the declaration, whether it be delivered or left in the office, before he can be admitted to plead<sup>n</sup>; and if he neglect to do so, the plaintiff's attorney may refuse to accept his plea, and sign judgment<sup>o</sup>.

Where the defendant has appeared or filed bail, or the plaintiff has entered an appearance, or filed bail for him, accord-

<sup>k</sup> R. T. 2 G. II. 8 Mod. <sup>m</sup> 3 Bur. 1452. 2 T. R. 379. 2 Ld. Raym. 1407. 112.

R. T. 1 G. II. <sup>n</sup> R. T. 12 W. III. R.

<sup>l</sup> Pr. Reg. 131. Cas. Prac. M. 10 G. II. Reg. 3.

C. B. 111. Barnes, 248. <sup>o</sup> 1 Will. 173.

S. C.

ing to the statute, the declaration must be delivered or filed *absolutely*. But it cannot be so delivered or filed, *before* appearance or bail; as the defendant till then is not in court<sup>p</sup>: Still however, for the sake of expediting the cause, by rendering the times for appearance and pleading concurrent, it is provided, that “ up-  
 “ on all process, returnable before the *last* re-  
 “ turn of any term, where no affidavit is made  
 “ or filed of the cause of action, the plain-  
 “ tiff *may*<sup>q</sup> file or deliver the declaration *de bene*,  
 “ *esse*, or *conditionally*, at the return of such  
 “ process, with notice to plead in *eight* days,  
 “ after the filing or delivery thereof; and if  
 “ the defendant do not file common bail, and  
 “ plead within the said eight days, the plain-  
 “ tiff, having first filed common bail for him,  
 “ may sign judgment for want of a plea. And  
 “ that upon all such process as aforesaid, where  
 “ an affidavit is made and filed of the cause  
 “ of action, the declaration may be filed or  
 “ delivered *de bene esse*, at the return of such  
 “ process, with notice to plead in *four* days  
 “ after such filing or delivery, if the action be  
 “ laid in *London* or *Middlesex*, and the defend-

<sup>p</sup> Lofft, 333. 2 T. R. do so. *Carmichael* against  
 719. *Troutbeck*, T. 24 G. III.

<sup>q</sup> But he is not bound to *Ante*, 155.

“ ant

“ ant live within twenty miles of *London*;  
 “ and in *eight* days, if the action be laid in  
 “ any other county, or the defendant live  
 “ above twenty miles from *London*: and if  
 “ the defendant put in bail, and do not plead  
 “ in due time, judgment may be signed;  
 “ provided the declaration, in either case, be  
 “ filed or delivered, and notice thereof given,  
 “ *four* days exclusive before the end of the  
 “ term, and a rule to plead be duly enter-  
 “ ed<sup>r</sup>.”

Upon process returnable the *last* return of the term, the declaration cannot be filed or delivered *de bene esse*<sup>r</sup>; nor can it be so filed or delivered, upon process returnable on any other return, *after* the defendant has appeared or filed bail<sup>r</sup>; or after the time for his appearance is expired<sup>1</sup>. Where the defendant has neglected to appear, or file *common* bail in due time, the plaintiff must enter an appearance, or file common bail for him, according to the statute; and then file or deliver his declaration *absolutely*: and where the neglect is of putting in or perfecting *special* bail, the plaintiff must

<sup>r</sup> R. T. 22 G. III. Form-  
 er rules, T. 5 & 6 G. II. M.  
 10 G. II.

<sup>1</sup> 1 Bur. 56. Barnes, 342.  
 Pr. Reg. 145, 6. 2 T. R.  
 720.

proceed



proceed against the sheriff, or his bail upon the bail-bond.

If the plaintiff do not declare in due time, he is liable to be *nonpros'd*. But unless the defendant's attorney take advantage of the plaintiff's neglect, by signing a judgment of *nonpros*, the plaintiff may declare by *bill*, at any time within a *year* next after return of the process<sup>1</sup>. The judgment of *nonpros*<sup>2</sup> or *nonsuit*, for want of a declaration, is a final judgment, and signed with the clerk of the judgments, in the king's-bench office; an *incipitur* being first made on a roll, and on a sheet of paper, called a judgment-paper, stamped with a double half-crown stamp. In actions by *bill*, it is founded on the statute 13 Car. II. stat. 2. c. 2. § 3. by which it is enacted, "that upon an appearance entered for the defendant, by at-

<sup>1</sup> 2 T. R. 112. 3 T. R. 123, 4. But see 12 Mod. 217. R. M. 10 G. II. Reg. 2. (b). *contra*. the proper appellation of the judgment, in actions by *bill*; but in actions by *original*, where the language of the

<sup>2</sup> It is called a judgment of *nonpros*, from the words *non prosequitur*, &c. formerly used in entering it up. And this seems to be judgment was *non prosequitur breve vel sectam*, it is more commonly called a judgment of *nonsuit*. *Ante*, 218, &c.

" *torney*,

“ *torney*, of the term wherein the process is  
 “ returnable, unless the plaintiff shall put in-  
 “ to the court from whence the process issued,  
 “ his bill or declaration against the defendant,  
 “ in some personal action or ejectment of  
 “ farm, before the end of the term next fol-  
 “ lowing after appearance, a nonsuit for want  
 “ of a declaration may be entered against him;  
 “ and the defendant shall have judgment to  
 “ recover costs against the plaintiff, to be tax-  
 “ ed and levied in like manner as upon the  
 “ 23 Hen. VIII.” The provisions of this  
 statute are confined, in terms, to cases where  
 the defendant has been arrested: but it has  
 been holden, that if a defendant appear at  
 the day of the return of the process, and put in  
 bail, though he never were arrested, nor the  
 process returned, yet if the plaintiff do not de-  
 clare within *two* terms, a *nonpros* may be en-  
 tered against him<sup>w</sup>. Hence it is a general  
 rule, that on *all* process issuing out of this  
 court, returnable at a day certain, if the de-  
 fendant appear by his attorney, and file bail,  
 of the term wherein the process is returnable,  
 and the plaintiff do not declare before the end  
 of the term next following, a *nonpros* may be

<sup>v</sup> c. 15.

32. S. C.

<sup>w</sup> 2 Salk. 455. 7 Mod.

signed,

signed, without entering any rule to declare, or calling for a declaration<sup>x</sup>. But a *nonpros* can never be signed, unless bail be filed of the term wherein the process is returnable<sup>y</sup>; and therefore it cannot be signed, where a prisoner is superseded for not declaring, &c. on filing common bail<sup>z</sup>.

In a joint action, it is said, the plaintiff cannot be *nonpros'd* by one or more of the defendants, without the others<sup>a</sup>. And this is universally true in actions by *original*, where the plaintiff cannot proceed against the defendants severally, upon a joint writ. But upon process in *trespass*, if the plaintiff declare, serve a notice of declaration, or even take out a rule for further time to declare, against one or more of several defendants, and do not proceed against the others, the latter may sign a judgment of *nonpros*<sup>b</sup>. Even in *trespass*, however, there ought to be but one judgment of *nonpros*, for all the defendants, unless the plaintiff have indicated his intention of proceeding against them severally; for the tref-

<sup>x</sup> R. M. 10 G. II. *reg.* 2.  
(b). Gilb. K. B. 345.

<sup>y</sup> *Holmes v. White*, E. 11  
G. III. *Ante*, 125.

<sup>z</sup> *Impey*, 415. 1 *Crompt.*  
127.

<sup>a</sup> *Doug.* 161.

<sup>b</sup> 2 T. R. 257.

pass is joint, and though the plaintiff may declare severally, yet it remains joint, till it be severed by the declaration <sup>c</sup>.

Wherever the defendant is entitled to a judgment of *nonpros*, he is, as a necessary consequence, entitled to *costs* <sup>d</sup>; for which he may either take out execution, or bring an action of *debt* upon the judgment. It has even been holden, that an *executor* is liable to pay costs, upon a judgment of *nonpros* <sup>e</sup>. And the court, in two cases, have ordered the costs to be paid by the plaintiff's attorney; in one of them, at the instance of the *defendant*, upon an affidavit that the plaintiff could not be found <sup>f</sup>: and in the other, at the instance of the *plaintiff* himself, where his attorney refused to proceed, without being furnished with money <sup>g</sup>.

If the judgment of *nonpros* be *regular*, the court will not set it aside <sup>h</sup>. But it may be set aside on motion, if *irregular*, with the proceedings that have been had upon it. A

<sup>c</sup> 2 Salk. 455. Com. Rep. 1 T. R. 373.  
 74. S. C. 4 Bur. 2418. Vin. <sup>e</sup> 3 Bur. 1584.  
 Abr. tit. *Costs*, 4 V. 341. *contra*. <sup>f</sup> 1 Str. 402.  
<sup>d</sup> 23 Hen. VIII. c. 15. <sup>g</sup> Say. Rep. 172.  
 8 Eliz. c. 2. 4 Jac. I. c. 3. <sup>h</sup> 1 Bur. 401.  
 13 Car. II. stat. 2. c. 2.

judgment



judgment of *nonpros* cannot regularly be signed pending an injunction<sup>i</sup>. And where it was signed for not adjourning an effoin, cast upon a special *capias*, and the plaintiff took no notice of it, but delivered his declaration, and after the rule to plead was out, and a plea called for, signed judgment; the court, considering it as a trick, declared, that as there was no colour for the effoin, or to expect the plaintiff to search after a *nonpros*, and there was no notice given of it, the plaintiff was right to go on; and therefore they refused to set aside his judgment<sup>k</sup>.

<sup>i</sup> *Bowser v. Price*, E. 20      <sup>k</sup> 2 Str. 1194.  
G. III.

## C H A P. XIX.

Of Imparance, and Time for Pleading;  
and of the Summons and Order for fur-  
ther Time.

THE plaintiff having declared, the defend-  
ant is allowed a certain time to prepare  
for his defence; and that either with, or with-  
out an imparance.

*Imparance* is said to be, when the court gives  
a party leave to answer at another time, with-  
out the assent of the other party<sup>a</sup>; and in this  
sense, it signifies time to reply, rejoin, surre-  
join, &c. But the more common significa-  
tion of imparance is time to plead<sup>b</sup>: and it is  
either *general*<sup>c</sup>, without saving to the defendant  
any exception, which is always to another  
term<sup>d</sup>; or *special*, which is sometimes to ano-  
ther day in the same term<sup>e</sup>, with a saving of all

<sup>a</sup> Com. Dig. tit. *Pleader*, Bac. Abr. 27, 8. 3 Blac.  
D. 1. Com. 301.

<sup>b</sup> 2 Mod. 62. 2 Show. <sup>d</sup> 6 Mod. 28.  
310. Barnes, 346. <sup>e</sup> 6 Mod. 8. 10 Mod.

<sup>c</sup> Hardr. 365. 1 Lutw. 127. Com. Dig. tit. *Pleader*,  
46. 12 Mod. 529. S. C. D. 1.  
Gilb. C. P. 183, 211. 4

exceptions

exceptions to the writ, bill, or count; or of all exceptions whatsoever: which latter is called a *general-special* impar lance. The *general* impar lance is of course, where the defendant is not bound to plead the same term; but a *special* impar lance is not allowed, without leave of the court <sup>f</sup>.

After a *general* impar lance, the defendant can only plead in *bar* of the action <sup>g</sup>; and cannot regularly plead to the *jurisdiction* of the court <sup>h</sup>, in *abatement* <sup>h</sup>, or a *tender* and *touts temps prist*. It is then also too late to claim *consuance* <sup>h</sup>, or demand *oyer* of a deed <sup>h</sup>, &c. After a *special* impar lance, the defendant may plead in abatement <sup>i</sup>, though not to the jurisdiction of the court. And where the defendant pleaded a misnomer in abatement, after an impar lance, which was entered thus, "And " A B. who was arrested by the name of A C. " comes, &c." the court held this to be tantamount to a special impar lance <sup>k</sup>. After a *general-special* impar lance, the defendant may not only plead in abatement of the writ, bill, or count, but also *privilege* <sup>l</sup>, which is a plea to the

<sup>f</sup> R. E. 5 Ann.

<sup>k</sup> 1 Blac. Rep. 51. 1

<sup>g</sup> 4 Bac. Abr. 29. Gilb. C. P. 184.

Willf. 261. S. C.

<sup>l</sup> 1 Lev. 54. Hardr. 365.

<sup>h</sup> *Vide Post*.

1 Lutw. 46. 12 Mod. 529.

<sup>i</sup> 1 Lutw. 6.

S. C. Gilb. C. P. 185, 211.

person

person of the defendant, affecting the *jurisdiction* of the court <sup>m</sup>. But he cannot plead a *tender* and *touts temps prist*, after any kind of imparlance <sup>n</sup>; for by craving time, he admits he is not ready, and so falsifies his plea. A *tender* must therefore be pleaded before imparlance, of the same term with the declaration; unless the declaration be delivered or filed so late, that the defendant is not obliged to plead to it that term: and then it may be pleaded of *course*, within the first four days inclusive of the next term <sup>o</sup>, or even afterwards, upon *motion*, as of the preceding term <sup>p</sup>.

If the defendant plead in abatement after a *general* imparlance, to the jurisdiction of the court after a *special* imparlance, or a *tender* after any kind of imparlance, the plaintiff may *demur* <sup>q</sup>, or alledge the imparlance in his replication, by way of *estoppel* <sup>r</sup>; but if the plaintiff, instead of demurring, or alledging the estop-

<sup>m</sup> 5 Mod. 335.

see Dyer, 300.

<sup>n</sup> 4 Bac. Abr. 28. Gilb.

<sup>o</sup> 1 Bur. 59.

C. P. 184. Sty. P. R. 465.

<sup>p</sup> Barnes, 343, 351, 355,

2 Lil. P. R. 37. 1 Sid. 365.

357, 359, 361, 362.

2 Mod. 62. 2 Salk. 622. 1

<sup>q</sup> Sty. P. R. 465. 3 *Inst.*

Ld. Raym. 254. Carth.

*Cler.* 40. *Green v. Simmister*,

413, 14. S. C. 1 Lutw.

H. 27 G. III.

238, 9. R. E. 5 Ann: (a).

<sup>r</sup> 1 Lutw. 23. 3 *Inst.*

R. T. 5 & 6 G. II. (b). But

*Cler.* 39.



pel, reply to the special matter of the plea, the fault is cured <sup>s</sup>.

Formerly, the defendant had always an imparlance, to the term next after the return of the process, unless the proceedings were by *original* <sup>t</sup>, upon a *habeas corpus*, for or against *attornies* or other privileged persons, or against *prisoners* in custody of the marshal <sup>u</sup>. On proceedings by *original*, if the action were laid in *London* or *Middlesex*, and the defendant appeared before the *last* return of the term; or if the action were laid in any other county, and the defendant appeared the *first* return of *Hilary* or *Trinity* term, or before the *third* return of *Michaelmas* or *Easter* term; no imparlance was allowed, without consent or special rule <sup>v</sup>. So upon a *habeas corpus*, returnable in *Michaelmas* or *Easter* term, if the declaration were delivered before the *third* return, the defendant was not entitled to an imparlance <sup>w</sup>. And where the proceedings were for or against *attornies* or other privileged persons <sup>x</sup>, or against *prisoners* in custody of the marshal <sup>y</sup>, the defendant was

<sup>s</sup> 1 Ventr. 236.

<sup>w</sup> 1 Mod. 1. 2 Salk. 515.

<sup>t</sup> Skin. 2. but see 8 Mod.

1 Willf. 154.

228.

<sup>x</sup> 2 Salk. 517. 6 Mod. 175.

<sup>u</sup> R. M. 5 Ann. III. (a). R. E. 5 W. & M. III. §  
Gilb. K. B. 310. Gilb. C. 3. (a). and see R. M. 5 Ann.  
P. 43, 182. 4 Bac. Abr. 27. III. (a).

<sup>v</sup> R. M. 1654. § 15.

<sup>y</sup> R. H. 2 G. II.

bound to plead, without any imparlance, the same term the declaration was delivered, if delivered *four* days exclusive before the end of the term. Afterwards, when the clause of *ac-etiam* had been introduced into the bill of *Middlesex*, and other process in trespass, it became a rule, that where the cause of action was specially expressed in the process, the defendant should not have liberty of imparling, without leave of the court; but should plead within the time allowed, by the course of the court, to defendants sued by original writ <sup>y</sup>. And at length it was determined, that even upon a special *capias* by original, the defendant should not be obliged to plead, sooner than upon a common *latitat* <sup>z</sup>. The former distinctions upon this subject being thus gradually abolished, it is now settled <sup>a</sup>, that where the defendant has appeared, or filed bail, upon any kind of process, returnable the *first* or *second* return of any term, if the plaintiff declare in *London* or *Middlesex*, and the defendant live within twenty miles of *London*, the declaration should be delivered or filed *absolutely*, with notice to plead within *four* days; or in case the plaintiff declare in any other county, or the defendant live above twenty miles from *London*, within *eight*

<sup>z</sup> 1 Str. 684.

<sup>a</sup> R. T. 5 & 6 G. II.

days *exclusive*<sup>b</sup> after the delivery or filing thereof; and the defendant must plead accordingly, without any imparlance: or in default thereof, the plaintiff may sign judgment.

Where the defendant has not appeared, or filed bail, the rule<sup>c</sup> is, that “ upon all “ process returnable before the *last* return “ of any term, where no affidavit is made “ and filed of the cause of action, the “ plaintiff may file or deliver the declaration “ *de bene esse*, at the return of such process, “ with notice to plead in *eight* days *exclusive*<sup>d</sup>, “ after the filing or delivery thereof;” being the same time as is allowed for the defendant to appear and file common bail<sup>e</sup>: and “ if the “ defendant do not file common bail, and “ plead within the said eight days, the plaintiff, having filed common bail for him, may “ sign judgment for want of a plea<sup>f</sup>.” But if the declaration be not filed, until *after* the return of the process, the defendant has *eight* days to plead, from the time of filing it, whenever it may be<sup>f</sup>. And “ upon all such process,

<sup>b</sup> R. T. 5 & 6 G. II. (a).

<sup>d</sup> *Id.* (a).

<sup>c</sup> R. T. 22 G. III. and see the former rule of M. 10 G. II. Reg. 2.

<sup>e</sup> *Ante*, 122.

<sup>f</sup> 1 Bur. 56. *Delatre* and *Mango*, M. 20 G. III.

“ where

“ where an affidavit is made and filed of the  
 “ cause of action, the declaration may be filed  
 “ or delivered *de bene esse*, at the return of such  
 “ process, with notice to plead in *four* days af-  
 “ ter the filing or delivery, if the action be laid  
 “ in *London* or *Middlesex*, and the defendant  
 “ live within twenty miles of *London*, and in  
 “ *eight* days, if the action be laid in any other  
 “ county, or the defendant live above twenty  
 “ miles from *London*;<sup>g</sup>” being the same time  
 as is allowed for pleading, where the declara-  
 tion is delivered or filed *absolutely*<sup>g</sup>: and, “ if  
 “ the defendant put in bail, and do not plead  
 “ within such times as are respectively before-  
 “ mentioned, judgment may be signed.” But  
 in all the foregoing cases, the declaration should  
 be delivered, or filed and notice thereof given,  
*four* days *exclusive* before the end of the term,  
 a rule to plead duly entered, and a plea de-  
 manded, when necessary<sup>h</sup>.

Where the process is returnable the *last* re-  
 turn of the term<sup>h</sup>, or where it is returnable  
 before, but the declaration is not delivered,  
 or filed and notice thereof given, *four* days  
*exclusive* before the end of the term<sup>i</sup>, the de-  
 fendant is entitled to an imparlance; and must

<sup>g</sup> *Ante*, 243.

R. T. 22 G. III.

<sup>h</sup> R. T. 5 & 6 G. II. (*b*).

<sup>i</sup> R. T. 5 & 6 G. II. (*b*).

R. M. 10 G. II. *Reg.* 2.



plead within the first *four* days of the next term, provided the declaration be delivered, or filed and notice thereof given, before the effoin-day of that term: otherwise the defendant will be allowed to imparl to the subsequent term<sup>k</sup>.

If four terms have elapsed, since the delivery or filing of the declaration, the defendant shall have a whole term's notice to plead, before judgment can be entered against him<sup>l</sup>, unless the cause have been stayed by *injunctio*<sup>m</sup> or privilege; and the notice in such case must be given before the effoin-day of the term<sup>n</sup>: but it does not extend beyond the term; and therefore a rule to plead may be entered, and judgment signed, in the vacation<sup>o</sup>.

It remains to be observed, within what time the defendant must plead after changing the *venue*, demanding *oyer*, or *amending* the declaration. After changing the *venue*, the defendant must plead to the new action, as he should have done in the other, without delay<sup>p</sup>. After the delivery of *oyer*, the defendant shall

<sup>k</sup> Vid. *Introd.* II.

<sup>n</sup> 2 Str. 1164. 1 Str. 211.

<sup>l</sup> R. T. 5 & 6 G. II. (*b*). *contra*.

<sup>m</sup> *Id. ibid.* 2 Bur. 660. <sup>o</sup> 2 T. R. 40.

Doug. 71. 2 Blac. Rep. <sup>p</sup> R. M. 1654. § 5.

784.

have the same time to plead, as he had when he demanded it<sup>q</sup>. And if the plaintiff *amend* his declaration, the defendant shall have *two* days, exclusive of the day of amendment, to alter his first plea, or plead *de novo*<sup>r</sup>.

If the defendant be not ready to plead, by the expiration of the time allowed him for that purpose, his attorney or agent should take out a *summons*, and serve it upon the plaintiff's attorney or agent<sup>s</sup>, requiring him to attend a judge, and shew cause why the defendant should not have further time to plead. When the summons is taken out, and made returnable, before the expiration of the time for pleading, it is a stay of proceedings, pending the application<sup>u</sup>: but it is otherwise when taken out, or made returnable, after the expiration of the time for pleading<sup>v</sup>; nor will it operate as a stay of proceedings, where the object of it is collateral to the time for pleading<sup>v</sup>, as to discharge the defendant out of custody upon common bail, &c.

<sup>q</sup> R. T. 5 & 6 G. II. (b).  
<sup>r</sup> Str. 705.

<sup>s</sup> *Id.* and see R. M. 10 G. II. Reg. 2. (b).

<sup>t</sup> For the mode of serving the summons, and on whom it is to be served, see R. H. 8 G. III. Impey, 56, 7.

<sup>u</sup> Say. Rep. 165. Barnes, 240, 252. Caf. Prac. C. B. 137. Pr. Reg. 292. S. C. Barnes, 255. Caf. Prac. C. B. 144. S. C. Barnes, 254. Pr. Reg. 293. S. C.  
<sup>v</sup> *Per Cur.* M. 23 G. III.

The plaintiff's attorney or agent, on being served with the summons, either indorses his consent to an order being made upon it, attends the judge, or makes default. In the latter case, the defendant's attorney or agent, after waiting an hour, should take out a *second* summons, and after that a *third* (if necessary), which should be respectively served and attended as the first. And if default be made upon three summonses, the judge, on affidavit thereof, will make an order *ex parte*. But if any one of the summonses be attended, the judge will make an order upon, or discharge it, as he sees cause; and if he make an order for a month's time to plead, it is understood to mean a *lunar*, and not a *calendar*, month<sup>w</sup>.

The order of a judge for time to plead, must be served in like manner as the summons. And it is either upon, or without terms. The usual terms are pleading *issuably*, rejoining *gratis*, and taking *short* notice of trial or inquiry. And where the defendant is an *executor* or *administrator*, he must undertake not to plead any judgment obtained against him, since his time for pleading was out<sup>x</sup>; for otherwise he might confess judgments in the mean time,

<sup>w</sup> 3 Bur. 1455. 1 Blac.  
Rep. 450. S. C.

<sup>x</sup> 8 Mod. 308. and see 1  
Bullst. 122, 3.

and

and plead them in bar to the plaintiff's demand.

An *issuable* plea is a plea *in chief* to the merits<sup>y</sup>, upon which the plaintiff may take issue, and go to trial<sup>z</sup>. Therefore, a plea in abatement is not an issuable plea<sup>a</sup>; nor a false plea of judgment recovered<sup>b</sup>, or other plea which does not go to the merits<sup>c</sup>. But a plea of tender has been deemed an issuable plea<sup>d</sup>, and also a plea of the statute of limitations<sup>e</sup>, or that a bail-bond was taken for ease and favour<sup>f</sup>. As to *demurrers*, there is a distinction between a real and fair demurrer, and a demurrer without good cause<sup>g</sup>: The former is an issuable plea, within the meaning of a judge's order<sup>h</sup>; the latter is not, but only an evasion of it<sup>i</sup>. By rejoining *gratis* is meant, rejoining without the common four-day rule to rejoin<sup>k</sup>. *Short* notice of trial, in *country* causes, must be given at least *four* days before the commission-day; one day exclusive, and

<sup>y</sup> Barnes, 263.

<sup>z</sup> 2 Bur. 782.

<sup>a</sup> 1 Bur. 59. Barnes, 263.

<sup>b</sup> 1 Blac. Rep. 376.

<sup>c</sup> *Valle v. Gardiner*, H. 24 G. III. *Gillett and Ridley*, C. B.

<sup>d</sup> 1 Bur. 59. Barnes, 263.

<sup>e</sup> 3 T. R. 124. 2 T. R. 390. *contra*.

<sup>f</sup> 1 Bur. 605.

<sup>g</sup> 3 Bur. 1788, 9.

<sup>h</sup> 2 Str. 1185.

<sup>i</sup> Say. Rep. 88. *Gillett & Ridley*, C. B.

<sup>k</sup> Barnes, 271.



the other inclusive<sup>1</sup>. In *town* causes, *two* days notice seems to be sufficient<sup>m</sup>: But it is usual to give as much more, as the time will admit of. The defendant, however, is not precluded, by these terms, from demurring to the replication, if there be good cause<sup>n</sup>.

Where the defendant is under a judge's order to plead *issuably*, and pleads a plea which is not *issuable*, the plaintiff may consider it as a mere nullity, and sign judgment<sup>o</sup>: and where several pleas are pleaded, one of which is not *issuable*, it will vitiate all the others<sup>p</sup>. But where it is doubtful whether the plea be *issuable*, the better way, in term-time, is to move the court to set it aside<sup>q</sup>.

<sup>1</sup> R. E. 30 G. III. 3 T. <sup>o</sup> *Valle v. Gardiner*, H. R. 660. 24 G. III.

<sup>m</sup> Pr. Reg. 390.

<sup>p</sup> 3 T. R. 305.

<sup>n</sup> R. T. 5 & 6 G. II. (*b*). <sup>q</sup> 1 Bur. 59. 2 T. R. 390.  
2 Str. 1185.

## C H A P. XX.

## Of the Rule to plead, and Demand of a Plea.

**I**F a defendant be bound by rule of court, or order of a judge, to plead by a time therein limited, it is incumbent on him to do so, although the plaintiff do not enter any rule to plead, or call for a plea<sup>a</sup>. With this exception, the plaintiff must in all cases enter a rule to plead, whether the defendant have appeared or not; and where the defendant has appeared, he must also demand a plea, before he can sign judgment.

The rule to plead is the order of the court; and may be entered, at any time after the delivery, or filing and notice of the declaration, in term, or within four days after<sup>b</sup>; and *Sunday* is a day within this rule, unless it be the first or last<sup>c</sup>. Anciently, there were two rules given, of *four* days each; the first *ad respondendum*, the second *ad respondendum peremptorié*<sup>d</sup>. These

<sup>a</sup> R. T. 5 & 6 G. II. Pr.  
Reg. 290, 291. Cas. Prac.  
C. B. 67, 141. S. C.

<sup>c</sup> 2 Salk. 624. 1 Str. 86.

<sup>d</sup> Vid. *Introd.* II. 2 Salk.

517.

<sup>b</sup> Impey, 140.

were

were afterwards converted into one *eight-day* rule<sup>e</sup>; but now, “*four* days only shall be allowed the defendant, from the time of giving “any rule to plead<sup>f</sup> :” which four days expire before, with, or after the time for pleading. If they expire before, the plaintiff must wait till the expiration of the time for pleading, before he can sign judgment for want of a plea: But if they expire with or after that time, “the “plaintiff is at liberty to sign his judgment, “the day after the rule for pleading is out; “the declaration having been regularly delivered or filed, and the defendant or his “agent being called upon for a plea<sup>g</sup>.”

When a rule to plead has been once entered, and the cause stands over to another term, without any further proceeding, a new rule to plead should regularly be entered in that term, to entitle the plaintiff to sign judgment; for all judgments must be entered, the same term in which rules are given<sup>h</sup>. Where the declaration is *amended*, if a rule to plead be entered the same term the amendment is made, though before such amendment, it is sufficient<sup>i</sup>; otherwise a new rule to plead must

<sup>e</sup> 2 Salk. 517.

<sup>h</sup> Gilb. K. B. 318.

<sup>f</sup> R. T. 1 G. II. 2 Str.

<sup>i</sup> 2 Salk. 517. R. M. 10

1192.

G. II. reg. 2. (b).

<sup>g</sup> R. H. 2 G. II. reg. 3.

be entered. And where the plaintiff, after giving a rule to plead, has been delayed by *injunction*, he may sign judgment after the injunction is dissolved, without a new rule<sup>k</sup>.

The demand of plea is a notice in writing from the plaintiff's attorney; and, except where the defendant is in custody of the sheriff<sup>l</sup>, &c. must be made in every case where the defendant has appeared<sup>m</sup>. But before the defendant has appeared<sup>n</sup>, or after the plaintiff has entered an appearance, or filed common bail for him, according to the statute<sup>o</sup>, or where the defendant is in custody of the sheriff<sup>p</sup>, &c. the demand of a plea is unnecessary. It is usually made *pending* the time for pleading; and the plaintiff cannot sign judgment, till the expiration of twenty-four hours from the time of making it<sup>q</sup>. But if the time for pleading be out, judgment may be signed at any time after the twenty-four hours are expired; and therefore if the plea be demanded in the *morning*, the plaintiff is not obliged to wait until the opening of the office, in the *afternoon* of the following day<sup>r</sup>.

<sup>k</sup> 2 Bur. 660. Doug. 71.      <sup>o</sup> R. T. 1 G. II. Barnes,  
2 Blac. Rep. 784. Barnes, 249.

238.

<sup>l</sup> 1 T. R. 591.

<sup>m</sup> 1 Will. 134.

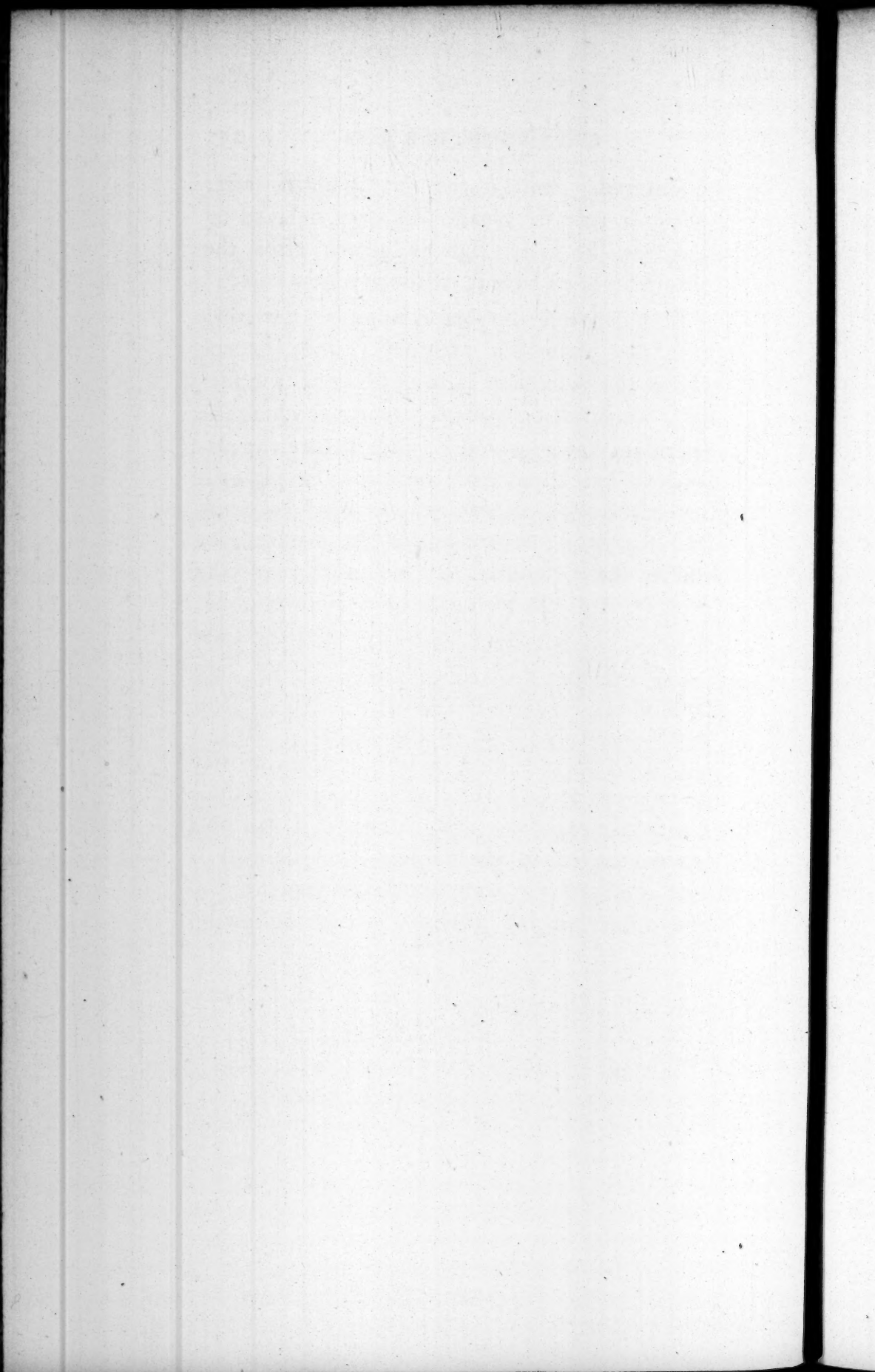
<sup>n</sup> 1 T. R. 635.

<sup>p</sup> 1 T. R. 591.

<sup>q</sup> 1 Blac. Rep. 50.

<sup>r</sup> 1 T. R. 454.





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A  
T A B L E  
O F T H E  
P R I N C I P A L M A T T E R S.

ABATEMENT. 27, 211, 240.

ACCOUNT. 24, 56, 221.

AC-ETIAM, 89.

unnecessary, for less than forty pounds. 90.

necessary, in process against bail. 90.

against several defendants. 90.

ACTIONS,

real. 1.

personal. 1.

mixed. 1.

division of. 4.

joinder in. 7.

for criminal conversation. 6, 8.

penal. 12, 34, 189, 190.

of escape. 109.

for a false return. 109, 161.

upon bail-bonds. 156.

AFFIDAVIT, of the cause of action ;

in what cases requisite. 29.

by whom made. 39.

before whom. 39.

at what time. 88.

must be single. 39.

form of; 40.

by an executor or administrator. 40.

assignee of a bankrupt. 40.

bond. 41.

AFFIDAVIT,

## THE TABLE.

**AFFIDAVIT**, of the cause of action;  
 what if there be none, or it be defective, &c. 41, 108.  
 court will not go out of it. 41.  
 need not be made before an outlawry. 65.

**AMBASSADORS**. 25, 42.

**AMENDMENT**,

of the original writ. 15.  
 bill of Middlesex. 91.  
 process, in general. 98.  
 record, by a new bill. 191.  
 declaration. 227, 8.  
 time to plead after. 247.  
 rule to plead. 252.

**AMOVEAS MANUS**. 74.

**ANNUITY**. 221.

**APPEAL**. 77.

**APPEARANCE**,

to reverse an outlawry. 70.  
 in person. 112.  
 by attorney. 16, 17, 70, 111.  
*prochein amy*. 116.  
 guardian. 116.  
 of the defendant,  
 what. 119.  
 different from bail. 119.  
 voluntary. 119.  
 by original; 17. 18.  
 with whom, and when entered. 119, 120.  
 upon the *capias*, &c. 123.  
 common or special. 120.

**APPEARANCE-DAY**. 17.

**ARREST**,

at common law. 24.  
 statutes respecting it; 28.  
 different ways of proceeding thereon. 30.  
 in what cases allowed, and in what not. 30, 41.  
 in Wales. 31.  
 counties palatine. 31.  
 of seamen. 31.  
 soldiers. 31.  
 of course, or by special order. 32.  
 in trover. 33.  
 debt on statute. 34.  
 recognizance of bail, &c. 34.

**ARREST**,

## THE TABLE.

### ARREST,

- in debt on bond, for payment of money. 34.
- performance of covenants, &c. 35.
- where there have been mutual dealings. 35.
- not allowed twice, for the same cause. 36.
- after a *non-pros.* 36.
- discontinuance. 37.
- superfedeas.* 37.
- in debt on judgment. 38. 216.
- upon an award. 39.
- privilege from ;
- of the royal family. 42.
- servants of the king's household. 42.
- ambassadors, and their domestic servants. 42.
- peers, and peereſſes of the realm, and their servants. 44.
- members of the houſe of commons. 45.
- convocation, and their ſervants. 46.
- corporations aggregate. 46.
- hundredors. 46.
- bankrupts. 46.
- inſolvent debtors, and fugitives. 48.
- executors and adminiſtrators. 48.
- married women. 49.
- attornies, and other officers of the court. 50.
- parties to a ſuit, and their witneſſes. 51.
- clergymen. 52.
- in what places. 52.
- at what time. 53.
- how taken advantage of. 54.
- upon the *exigi facias.* 60.
- capias utlagatum.* 62.
- how made. 101, 102.
- by whom. 101.
- when. 102.
- where. 102.
- by what authority. 102.
- conſequences of. 103.

ASSUMPSIT. 4, 7, 9, 32.

ATTACHMENT, of goods, by original. 18.

bill in treſpaſs. 86.

of privilege. 75.

of the perſon ;

againſt peers of the realm. 45.

S

ATTACHMENT,



## THE TABLE.

### ATTACHMENT,

for a contempt, may be executed on a Sunday. 53.  
not bailable. 104.  
of a criminal nature. 194.  
in not obeying the process of the court. 92, 176, 7, 8.  
in speaking contemptuous words of the court, or its process. 101.  
against an attorney, for not performing his undertaking. 108, 124.  
for a rescue. 109.  
how returnable. 110, 164.  
against the sheriff, for nonpayment of money. 69.  
for not returning the writ. 160.  
bringing in the body. 164.  
to whom directed. 164, 166.  
may be moved for on the last day of term. 164.  
proceedings thereon. 164.  
for not returning an attachment. 165.

### ATTORNIES, and other OFFICERS of the court;

privileged from arrest. 50.  
privileges of, in general. 75.  
may sue by attachment of privilege; 75.  
what it is. 77.  
how sued out. 78.  
arrest thereon. 79.  
time for declaring. 79.  
pleading. 79.  
must be sued by bill; 75.  
what it is. 79.  
its conclusion. 79.  
when and how filed. 79, 80.  
declaration. 80.  
time for pleading. 80.  
need not pay for copies of the pleadings. 80.  
undertaking to appear;  
in bailable actions. 108.  
upon common process. 124.  
to reverse an outlawry. 64.  
by whom appointed. 111.  
in what manner. 112.  
appearing without warrant. 112.  
withdrawing themselves. 112.  
cannot be changed without leave. 113.

ATTORNIES,

## T H E T A B L E.

ATTORNIES, &c.

dying. 113.

cannot be bail. 141.

AVERMENT, writ of. 19.

BAIL,

upon an *exigi facias*. 60.

reversing an outlawry. 71.

an attachment of privilege. 78.

to the sheriff; 103.

not discharged, by a render before the return of the writ. 126.

how far liable. 157.

in what cases relivable, on the death of their principal, &c. 157.

to the action;

common or special. 121.

history of. 121.

governed by the arrest. 122.

necessary to be filed, for supporting the proceedings. 121. 187.

common; 33, 37, 41, 83, 121, 187, 211, 213.

when and how filed, by the defendant. 122.

by the defendant's attorney. 124.

by the plaintiff, according to the statute. 124.

will not entitle a third person to declare by the bye. 218.

penalty for not filing it. 123.

special; 30, 126, 216.

by whom put in. 126.

when. 126.

before whom. 127.

recognizance of, by bill. 129.

original. 132.

how far liable. 130, 132, 136, 7.

before a commissioner. 132.

absolute or *de bene esse*. 133.

origin of, *de bene esse*. 133. (r).

notice of; 134.

after the bail-bond is forfeited. 157.

exception to; 134, 5.

when necessary, to fix the sheriff. 163.

notice of exception. 136.

time allowed to add and justify. 136.

further time. 142.

## THE TABLE.

### BAIL, special;

- adding. 136.
- justifying; 137.
  - in person, or by affidavit. 137.
  - notice of justification. 138.
  - affidavit of service. 139.
- need not justify, to render. 145.
- grounds of opposing. 139.
- assuming feigned names. 140.
- personating others. 140.
- rule of allowance. 143.
- where the defendant is a prisoner. 144.
- may take their principal, at any time. 46, 53.
- when and how discharged,
  - by rendering him. 144.
  - in what cases the render may be pleaded. 146.
  - notice of render. 149.
  - affidavit of service. 150.
  - entry in the marshal's book. 151.
  - of an *exoneretur* on the bail-piece. 150, 152.
- discharged, by declaring for a different cause of action, or in a different county, &c. 151.
- on removing a cause from an inferior court. 172.
- upon a *habeas corpus*. See title *Habeas corpus*.

### BAIL-BOND,

- upon a *capias utlagatum*. 64.
- form of. 106.
- when good, though the condition vary from the writ. 106.
- in what cases an assignment should be taken, and in what not. 153.
- at what time it may be taken. 155.
- by whom made. 156.
- action on, must be brought in the same court. 156.
- of setting aside, or staying the proceedings. 156.
- terms on staying them. 156, 7.

### BAIL-PIECE,

- common. 123, 125, 213.
- special; 129, 132, 133.
- when transmitted. 132.
- filed, upon an acceptance of the bail. 134.
- for want of an exception. 135.
- after justification. 143.

BAIL-

## T H E T A B L E.

### BAIL-PIECE,

on a *habeas corpus*. 180.

*exoneretur* on. 148, 149, 150, 152.

### BANKRUPT,

affidavit of debt, by the assignee of. 40.

how far privileged from arrest. 47.

liable to costs, for false pleading. 47.

uncertificated, cannot be bail. 141.

bail of, how discharged. 149.

BARON and FEME. 49, 101.

### BILL,

division of the proceedings by. 2.

against attornies, &c. 79.

peers, and members of the house of commons. 3,

81, 82.

unprivileged persons. 82.

in trespass. 85.

against prisoners, in the actual or supposed custody of the marshal; 186.

when actually filed, and when not. 188.

how far considered as the commencement of the suit. 188.

against prisoners, in the actual custody of the marshal. 193.

not necessary, against prisoners in the actual custody of the sheriff, &c. 199.

BILL of MIDDLESEX. See title *Process*.

### CAPIAS,

*ad respondendum*, when it lies. 24.

*ad satisfaciendum*, outlawry upon. 57.

against peers of the realm. 84.

for charging the defendant in execution, in a county-gaol. 209.

*utlagatum*, general. 62.

special. 65.

CASE, actions on. 6, 7, 12, 24, 221.

CINQUE-PORT. 92.

CLERGYMEN. 52.

COMMITMENT. 147, 148, 209.

entry of. 209.

COMMITTITUR-PIECE. 209.

CONTEMPTUOUS-WORDS. See title *Attachment*.

CONVOCATION, members of. 46.



## T H E T A B L E.

CONUSANCE. 240.

COPY of procefs. See title *Procefs*.  
 declaration. See title *Declaration*.

CORPORATION. 3, 16, 20, 22, 24, 46, 111.

COSTS,

in actions for criminal conversation. 8.  
 of proceeding by *distringas*. 19, 20, 22.  
 no ground for an arrest. 38.  
 of false pleading, by a bankrupt. 47.  
 on reversing an outlawry. 73.  
 in actions by and against infants. 118.  
 recoverable against bail. 131, 132.  
 for not appearing on a *recordari facias loquelam*. 185.  
 of *nonpros*. 185, 237.

COVENANT. 5, 7, 9, 11, 32, 221.

COUNTY-PALATINE. 31, 92, 99, 102.

DAMAGES. 32.

DEBT. 2, 5, 7, 9, 11, 24, 32, 34, 38, 56, 146, 221.

DECLARATION,

what. 221.  
 after an outlawry. 71. (*v*).  
 upon an attachment of privilege. 79.  
 against peers, and members of the house of commons. 83.  
 upon a *habeas corpus*. 184, 5.  
 against prisoners, in the actual custody of the marshal. 193.  
 sheriff, &c. 200.  
 when and how to be delivered. 201, 202.  
 in chief, or by the bye. 217.  
 by original;  
   time for declaring, nonsuit, &c. 217.  
   its title. 221.  
   venue. 221.  
   commencement. 221, 2.  
 by bill, what; 224.  
   time for declaring. 223, 234.  
   further time. 223.  
   should correspond with the procefs. 224.  
   upon general procefs. 225.  
   its title. 225.  
   venue. 227.  
   charge. 228.  
   pledges. 228.

DECLA-

## THE TABLE.

### DECLARATION,

- copy of, by whom made. 229.
- delivered or filed. 229.
- absolutely or *de bene esse*. 231.
- paying for. 229, 231.
- filed, only good from the time of notice. 231.
- nonpros*. See title *Nonpros*.

DEMAND, of declaration; 219, 221.  
plea. 206, 253.

DEMURRERS. 249.

DETINUE. 2, 5, 7, 9, 24, 56, 221.

DIES-DATUS. 219.

DISCONTINUANCE. 37, 146, 211.

DISTRINGAS. See titles *Process*, and *Sheriff*.

EJECTMENT. 221.

ELISORS. 92, 166.

### ERROR,

- when it lies to the exchequer-chamber. 3.
- cannot be assigned on *mesne process*. 27.
- to reverse an outlawry. 69.
- how it affects the proceedings against prisoners. 207, 8,
- 215.

ESCAPE. 109, 147.

ESSOIN, 16, 238.

- not allowed, in personal actions. 17.

ESTOPPEL. 241.

EXCEPTION-DAY. 17.

EXECUTION. See titles *Bail*, *Bail-piece*, and *Prisoners*.

EXECUTORS and ADMINISTRATORS. 40, 48, 77, 225,

237.

EXIGI FACIAS, writ of; 57.

*de novo*. 58.

EXONERETUR. See titles *Bail*, and *Bail-piece*.

FALSE-RETURN, action for. 161.

FEEs, action for. 176.

FINE, on original writs. 9.

FOREIGNERS. 141.

FUGITIVES. 48, 194. (n).

GUARDIAN. See titles *Appearance*, and *Infant*.

### HABEAS CORPUS,

- in civil cases. 167.
- cum causâ*. 147, 149, 168, 198.
- ad respondendum*. 170.
- ad satisfaciendum*. 171, 210.

S 4

HABEAS

## THE TABLE.

### HABEAS CORPUS,

how the defendant may be removed thereby, into the custody of the marshal. 171.

how long he shall remain there. 172.

for the removal of causes, from inferior courts; 172.

when it lies, and when not. 173.

how returnable. 176.

its effect. 176.

in what cases to be allowed, and in what not. 176, 7.

return of. 177, 8.

bail on; 179.

when and how put in, excepted to, and justified. 180.

how far liable. 181.

*procedendo*. 183.

declaration. 184.

*nonpros*. 185.

time for pleading. 242.

HUNDREDORS. 3, 20, 23, 24.

### IMPARLANCE,

what. 239.

general. 239.

special; 239.

not allowed, without leave of the court. 240.

general-special. 240.

what may be pleaded, or done after it. 240.

may be alledged, by way of estoppel. 241.

in what cases formerly allowed. 242.

at this day. 17, 245.

### INFANTS,

at what age they may be outlawed. 56.

must sue by *prochein amy*. 116.

cannot inform on penal statutes. 116.

must defend by guardian. 116.

how to appoint a *prochein amy*, or guardian. 117.

of annexing a copy of the rule to the declaration, or plea. 117, 118.

how far liable to costs. 118.

INFERIOR-COURT. See title *Habeas corpus*.

INJUNCTION. 207, 208, 215.

INQUISITION, upon an outlawry. 66.

INSOLVENT-DEBTORS. 48.

JOINDER, in action. 7.

IRREGULARITY, in process; 98.

when to be taken advantage of. 98.

ISSUABLE-

## T H E T A B L E.

- ISSUABLE-PLEA. 249.  
 ISSUES. 19, 21, 66.  
 LATITAT, See title *Process*.  
     how far considered as the commencement of the suit.  
     189.  
 LEVARI FACIAS. 67.  
 LIMITATIONS, statute of. 8, 189, 190.  
 MALE-FAZANCE. 6.  
 MARSHAL'S acknowledgment. 209.  
     book. 151, 196, 209.  
 MELIUS INQUIRENDUM. 67.  
 MEMBERS of the house of commons. 3, 17, 20, 24, 45.  
 MEMORANDUM, general;  
     to what time it relates. 190.  
     how controuled, or rectified. 190, 191.  
 MIS-FAZANCE. 6.  
 MUTUAL DEALINGS. 33.  
 NON-FAZANCE. 6.  
 NON OMITTAS. See title *Process*.  
 NONPROS,  
     for not adjourning an effoin. 16, 238.  
     arrest after. 36.  
     upon a *habeas corpus*. 185.  
     *recordari facias loquelam*. 185.  
     by original. 218.  
     bill. 234.  
     judgment of, how signed. 234.  
     in a joint action. 236.  
     costs of. 185, 237.  
     regular or irregular. 237.  
 NOTICE, to appear;  
     when necessary. 97.  
     its direction. 97.  
     form. 98.  
     irregularity in. 98.  
     to plead; 230.  
     after four terms. 246.  
     of trial, short. 249, 250.  
 OFFICERS of the court. See title *Attornies, &c.*  
 ORIGINAL-WRIT,  
     what. .  
     when it lies. 2.  
     benefit of proceeding by. 3.

ORIGINAL-



## THE TABLE.

### ORIGINAL-WRIT,

- divisions of. 4, 9.
- form. 9.
- direction. 10.
- teste. 13.
- return. 14.
- when aided, or amendable. 14, 15.
- necessary, for proceeding to outlawry. 56.
- need not be repeated, in the declaration. 222.

### OUTLAWRY, in civil actions, what ; 55.

- in a separate or joint action. 55, 214, 223.
- forfeiture upon. 55.
- women waived. 56.
- upon mesne process. 56.
- final process. 57.
- writ of *exigi facias*. 57.
- allocatur exigent*. 58.
- proclamation. 58.
- proceedings on the exigent. 60.
- arrest. 60.
- voluntary appearance. 60.
- bail. 60.
- judgment of outlawry, or waiver. 61.
- capias utlagatum*, general or special. 61.
- form of the general writ. 62.
- proceedings thereon. 62.
- bail. 62.
- bail-bond. 64.
- form of the special writ. 65.
- proceedings thereon. 66.
- inquisition. 66.
- return. 67.
- transcript into the exchequer. 67.
- venditioni exponas*. 67.
- scire facias*. 67.
- levari facias*. 67.
- bill of discovery, &c. 67.
- how to obtain satisfaction, from the outlaw's property. 68, 9.
- of reversing it, by writ of error or motion. 69.
- appearance. 70.
- bail. 71.
- costs. 73.

### OUTLAWRY,

## THE TABLE.

### OUTLAWRY, in civil actions;

restitution. 74.  
 declaration. 71. (*v*).

OYER, 27, 222, 240.  
 time to plead after. 246.

### PEERS, and MEMBERS of the house of COMMONS; 81.

may be proceeded against by original writ, or bill. 3, 81.

cannot cast an essoin. 17.

process against, by original. 20.

cannot be arrested. 24, 44.

bill against, what. 82.

its conclusion. 82.

how filed. 82.

of the process thereon. 82.

form. 83.

teste and return. 83.

appearance. 83.

declaration. 83.

cannot be taken in execution. 84.

### PENAL-STATUTES, actions on. 12, 34, 189.

### PLEADING,

to the jurisdiction of the court. 240.

to the person. 241.

in abatement. 27, 240.

in chief. 14, 77.

an attorney's privilege. 50. (*b*). 240.

in an action upon a bail-bond. 105, 106.

time for;

upon an attachment of privilege. 79.

upon a bill against attornies, &c. 80.

against prisoners in custody of the

marshal. 197, 242, 3.

sheriff, &c. 204.

upon a *habeas corpus*. 242.

by original writ, or bill in trespass;

formerly. 242.

at this day;

when the plaintiff declares absolutely. 243.

*de bene esse*. 244.

after an imparlance. 245, 6.

four terms. 246.

changing the venue. 246.

demanding oyer. 246.

amending the declaration. 247.

## T H E T A B L E.

### PLEADING,

of obtaining further time to plead. 247.

a month, what. 248.

issuably. 248.

### PLEADINGS, copies of,

paying for. 80.

### PLEDGES, by original. 18.

bill. 228, 9.

### PLENE ADMINISTRAVIT. 191, 227.

### PRISONERS, how bailed. 104.

proceedings against ;

on a removal to or from the Fleet, or prison of an inferior court ;

before declaration. 169.

after declaration. 170, 210.

in custody of the marshal, previous to the plea ;

bill against. 188.

time for declaring, on a removal or commitment.

192.

on a surrender, in discharge of bail. 193.

further time. 214, 223.

mode of proceeding, by the same plaintiff, for the same cause of action. 193.

upon an attachment of privilege, or process in trespass. 193.

by original writ. 193.

for a different cause of action. 194.

when and how chargeable, by the same plaintiff, or a third person. 195.

in term. 196.

vacation. 196.

rule as to detainer. 196.

time for pleading. 197, 242, 3.

in custody on a *criminal* account, cannot be charged with a *civil* action, without leave. 194.

in custody of the sheriff, &c. previous to the plea ; 198.

by the same, or a different plaintiff. 200.

time for declaring. 201.

further time. 214, 223.

mode of declaring. 203.

affidavit of the delivery, &c. 203.

times for appearing, and pleading. 204.

demand of plea, &c. 206.

### PRISONERS,

## T H E T A B L E.

### PRISONERS,

- in custody of the marshal or sheriff, &c. subsequent to the plea;
- times for proceeding to trial or final judgment, and charging them in execution. 207.
- mode of charging them in execution. 208.
  - in the king's-bench prison. 208.
  - in a county-gaol. 209.
  - in the Fleet. 210.
  - in the prison of an inferior court. 210.
- new charge unnecessary, on plaintiff's death. 211.
- when and how discharged, from the custody of the marshal or sheriff, &c. for not proceeding in due time, &c. 211.
- causes to prevent their discharge. 213.
- consequences of being superseded, or supersedeable. 215.

### PRIVILEGE,

- of parliament. 20, 45.
- persons. 42.
- place. 52.
- attornies, &c. 76.
  - how pleaded. 50. (b).
  - in what time. 240.

### PRIVITY, of contract. 11.

estate. 11.

### PROCEDENDO. See title *Habeas corpus*.

### PROCESS,

- by original;
  - summons. 16, 20, 221.
  - attachment. 18, 20, 221.
  - distringas*. 18.
  - issues. 19.
  - how far affected by the statute 12 G. 1. c. 29. 20.
  - against peers, and members of the house of commons. 20.
  - against corporations. 22.
  - hundredors. 23.
  - capias*. 24.
  - alias*
  - pluries*
  - testatum*
  - non omittas*
- } *capias*. 25, 6.
- teste and return of. 21, 26, 7.
- in what cases void. 53.

### PROCESS,



## THE TABLE.

### PROCESS,

- upon the bill against peers, &c. 82.
- in trespass;
  - attachment. 86.
  - bill of Middlesex. 87.
  - alias* } bill of Middlesex. 87
  - pluries* }
  - latitat.* 87.
  - alias* } *capias.* 87.
  - pluries* }
  - non omittas.* 88.
  - in what manner issued. 88.
  - by whom signed. 88.
  - when sealed. 88.
  - præcipe,* &c. 88.
  - form of. 88, 91, 92.
  - ac-etiam.* 88.
  - against bail. 90.
  - need not be in a plea of trespass. 91.
  - should correspond with the previous process. 91.
  - direction. 91.
  - teste. 92.
  - return. 93.
  - indorsement of the date. 94.
  - sum sworn to. 95.
  - attorney's name. 96.
  - notice to appear. 97.
  - irregularity. 98.
  - amendment. 98.
  - service of a copy of; 99.
  - in what cases. 99.
  - of what process. 99.
  - by whom. 100.
  - when. 100.
  - where. 100.
  - how. 100.
  - against husband and wife. 101.
  - when entered on a roll. 119.

PROCHEIN AMY. See title *Infant.*

PROCLAMATION, writ of. 58.

RECAPTION. 53, 200.

RECOGNIZANCE. See title *Bail.*

RECORDARI

## THE TABLE.

RECORDARI FACIAS LOQUELAM. 185.

REPLEVIN. 221.

RESCUE,

when the sheriff may return it. 109.

when not. 109.

plaintiff's remedy thereon. 109, 147.

fine, &c. 110.

RESTITUTION, on an outlawry. 64, 74.

RULE, to return the writ. See title *Sheriff*.

bring in the body. See the same title.

declare. 219, 221.

for further time. 223.

to plead. 251.

SCIRE FACIAS,

unnecessary, upon an outlawry after judgment. 61.

to recover an outlaw's debts. 67.

after a charter of pardon. 74.

after the defendant is charged in execution, 210, 211.

SEAMEN. 31.

SERVICE, of process. See title *Process*.

SHERIFF,

when to return his writs. 17.

his return to the process by original. 19, 20.

not bound to take notice of the defendant's privilege.

48, 50.

his duty upon a special *capias utlagatum*. 66.

entering a liberty, without a *non omittas*. 102.

his authority, under the writ. 101.

warrant. 101.

duty upon an arrest. 103.

in what cases liable for an escape. 109.

when he may return a rescue. 109.

of ruling him to return the writ; 159.

in what cases the rule cannot be had. 159.

at what time it may be taken out. 159.

of the service of the rule. 160.

is liable to an attachment, for not returning the writ. 160.

his return, and in what cases he is liable to an action thereon. 161.

of ruling him to bring in the body; 162.

at what time the rule may be taken out. 161, 2.

is liable to an attachment, for not complying with it; 164.

how far liable thereon. 166.

SHERIFF,

## THE TABLE.

### SHERIFF,

- in what cases relievable, and in what not. 166.
- of staying the proceedings against him, at the instance of the defendant. 166.
- how to proceed against the *late* sheriff, for not returning the writ. 160.
- to compel him to bring in the body. 162.
- for not bringing it in. 164.
- disfringas* against the *late* sheriff. 163.
- proceedings thereon. 165.

### SHERIFF'S-OFFICERS, &c.

- cannot be bail. 142.

### SOLDIERS. 31, 148.

### STATUTES,

- of Marlbridge, (52 Hen. III.) c. 23. *Capias*, 24.
- Westminster, II. (13 Edw. I.) c. 10. *Appearance*, 111.
- c. 11. *Capias*, 24.
- c. 24. *Original writ*, 4.
- 25 Edw. III. c. 13. *King's debtors*, 149.
- c. 17. *Capias*, 24.
- 8 Hen. VI. c. 1. *Members of convocation*, 46.
- c. 12. *Amendment*, 115.
- 23 Hen. VI. c. 9. *Bail*, 62, 103, 108.
- 19 Hen. VII. c. 9. *Capias*, 24.
- 6 Hen. VIII. c. 4. *Writ of proclamation*, 58.
- 23 Hen. VIII. c. 15. *Costs*, 235.
- 32 Hen. VIII. c. 21. *Dies juridicus*, 93.
- 8 Eliz. c. 2. *Costs*, 223. (a).
- 18 Eliz. c. 5. *Penal statutes, Infant*, 116.
- c. 14. *Original writ*, 14.
- 31 Eliz. c. 3. § 1. *Writ of proclamation*, 59.
- § 3. *Bail on outlawry*, 71, 2, 3.
- 43 Eliz. c. 5. *Habeas corpus*, 173.
- 21 Jac. I. c. 12. § 5. *Venue*, 12.
- c. 23. *Habeas corpus*, 174, 177.
- c. 26. § 2. *Personating bail*, 140.
- 13 Car. II. stat. 2. c. 2. § 2. *Ac-etiam*, 88.
- § 3. *Nonpros*, 234, 5.
- § 4. *Outlawry*, 62.
- 29 Car. II. c. 7. § 6. *Sunday*, 53.
- 4 & 5 W. & M. c. 4. § 1. *Bail*, 127.
- § 4. *Personating bail*, 140.
- c. 18. § 3, 4, 5. *Outlawry*, 62, 70, 72.
- c. 21. *Prisoners*, 168, 198.

### STATUTES

## THE TABLE.

### STATUTES.

- of 5 & 6 W. & M. c. 21. § 4. *Date of process*, 94.
- 8 & 9 W. III. c. 11. *Scire facias*, 184.
- 9 & 10 W. III. c. 25. § 42. *Date of process*, 94.
- 11 & 12 W. III. c. 9. § 2. *Arrest in Wales, and counties-*  
*palatine*, 30, 31.
- 12 & 13 W. III. c. 3. *Peers, and members of the house of*  
*commons*, 3, 81.
- 4 & 5 Ann. c. 16. § 3. *Warrant of attorney*, 113.
- § 20. *Bail-bond*, 154.
- 7 Ann. c. 12. *Ambassadors*, 24, 25, 42.
- 12 Geo. I. c. 29. § 1, 2. *Process, Arrest, Bail*, 28, 31,  
95, 99, 121, 122, 124, 179.
- § 3. *Habeas corpus*, 175.
- 1 Geo. II. c. 14. § 15. *Seamen*, 31.
- 2 Geo. II. c. 23. § 22. *Attorney's name, on process*, 96.
- 5 Geo. II. c. 27. § 1, 2, 3, 4. *Process, Arrest, Bail*, 28,  
122, 124.
- § 5. *Original writ*, 9, 10.
- 8 Geo. II. c. 16. § 4. *Hundredors*, 23.
- 12 Geo. II. c. 13. § 4. *Attorney's name, on warrant*, 96.
- 20 Geo. II. c. 37. § 2. *Rule to return writs*, 160.
- 29 Geo. II. c. 4. § 14. *Soldiers*, 32.
- 30 Geo. II. c. 8. § 20. *Soldiers*, 32.
- 10 Geo. III. c. 50. *Distringas, Issues*, 19, 165.
- 19 Geo. III. c. 70. *Arrest, Bail, Habeas corpus*, 28, 175,  
177, 179.
- 20 Geo. III. c. 70. § 34. *Excise-officers, Venue*, 12.
- 24 Geo. III. *sess.* 2. c. 47. § 35. *Custom-house officers,*  
*Venue*, 12.
- 25 Geo. III. c. 80. *Warrant of attorney*, 115, 126.

### SUMMONS. See title *Process*.

and order for time to plead, &c. 247.

how far it is a stay of proceedings. 247.

### SUNDAY. 53.

### SUPERSEDEAS,

arrest after, 37, 8.

upon an outlawry. 60, 62, 70, 74.

to the sheriff, &c. 210, 211, 213, 216.

cannot be pleaded to an action on the judgment. 216.

### SURRENDER, in discharge of bail. See titles *Bail*, and *Prisoners*.

### TENDER, 189, 190, 191, 227.

when to be pleaded. 240, 241.

T

TESTE



## THE TABLE.

### TESTE and RETURN,

- of the original writ. 13, 14.
- distringas*, &c. by original. 21.
- bill. 83.
- capias*, &c. by original. 26.
- writ of *exigi facias*. 58.
- proclamation*. 59.
- process in trespass. 91, &c.

### TORTS. 6, 8, 32.

### TRESPASS. 6, 7, 12, 32, 221, 228, 236.

### TRIAL, short notice of. 249, 250.

### TROVER. 33.

### VENDITIONI EXPONAS. 67.

### VENUE,

- by original; 10, 221.
- local. 10.
- transitory. 10, 11.
- in what actions it must be laid in a particular county. 12.
- in what cases it is irremovable. 12, 13.
- in actions by and against attorneys, &c. 75.
- by bill; 227.
- time to plead, after it is changed. 246.

### WAIVER of women. 56, 61.

### WALES. 31, 86.

### WARRANT, to arrest. 94, 96, 97, 101, 102.

- of attorney;
- in writing or by parol. 112.
- how long it continues in force. 112.
- of filing and entering it. 113.
- memorandum* or minute of. 88, 115, 125, 6.

### WITNESSES. 39, 51, 66.

END OF PART I.



## ERRATA

- Page 39. line 19. *for crimes, read crime.*  
46. line 4. *for statutes, read statute.*  
67. line 18. *dele may.*  
88. last line but two, *after general, add a comma.*  
164. last line but one, *after sheriff, dele comma.*  
192. at the top, *for Chap. XIV. read Chap. XV.*

TABLE

1. The first part of the table is a list of the names of the persons who have been elected to the office of Mayor of the City of New York since the year 1784. The names are arranged in alphabetical order, and the year of election is given in parentheses after each name. The second part of the table is a list of the names of the persons who have been elected to the office of Mayor of the City of New York since the year 1784. The names are arranged in alphabetical order, and the year of election is given in parentheses after each name.